

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the                    )  
Dayton Power and Light Company to                    ) Case No. 20-1651-EL-AIR  
Increase its Rates for Electric Distribution.            )

In the Matter of the Application of the                    )  
Dayton Power and Light Company for                    ) Case No. 20-1652-EL-AAM  
Accounting Authority.                                        )

In the Matter of the Application of Dayton                )  
Power and Light Company for Approval of                ) Case No. 20-1653-EL-ATA  
Revised Tariffs.    )

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

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An important issue for consumers is whether the PUCO will enforce a “rate freeze” that DP&L, OCC, and others agreed to in a 2009 settlement agreement. OCC, in seeking to enforce the rate freeze, moved to dismiss this case.<sup>1</sup> The PUCO denied OCC’s motion to dismiss but ruled that the rate freeze issue remains live, to be resolved at a later stage of this proceeding.<sup>2</sup>

In making that ruling, however, the PUCO erred in one regard. In its ruling, the PUCO implied that one basis for denying the motion to dismiss was that the motion to dismiss might be deemed to “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.”<sup>3</sup> As explained below, this is factually inaccurate because OCC’s motion to dismiss was filed before the statutory objection deadline and because OCC’s

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<sup>1</sup> Motion to Dismiss DP&L’s Application for a Rate Increase by Office of the Ohio Consumers’ Counsel (Aug. 5, 2021).

<sup>2</sup> Entry (Oct. 20, 2021).

<sup>3</sup> *Id.* ¶ 21.

objections include the same rate freeze issue that OCC sought to enforce through its motion to dismiss. Thus, the ruling was unlawful and unreasonable:

**Assignment of Error: The PUCO erred in denying OCC’s motion to dismiss on the grounds that it might be deemed to “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.”**

Accordingly, as more fully described in the attached memorandum in support, the PUCO should grant rehearing and modify the Entry under R.C. 4903.10 and O.A.C. 4901-1-35.

Respectfully submitted,

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*/s/ Christopher Healey*

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND AND INTRODUCTION**

OCC, DP&L, and other signed a settlement in 2009.<sup>4</sup> That settlement contains two terms of primary importance to this case. First, parties agreed that DP&L could continue to charge consumers under its Rate Stabilization Charge (“RSC” or “stability charge”) for the duration of its first electric security plan (“ESP I”).<sup>5</sup> Second, parties agreed that DP&L’s base rates would remain frozen for the duration of ESP I.<sup>6</sup>

Consumers are currently paying the \$76 million per year stability charge because DP&L has reverted (for the second time in three years) to its ESP I.<sup>7</sup> DP&L wants to escape its

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<sup>4</sup> *In re Application of the Dayton Power & Light Co. for Approval of its Elec. Sec. Plan*, Case No. 08-1094-EL-SSO, Stipulation & Recommendation (Feb. 24, 2009) (the “ESP I Settlement”).

<sup>5</sup> ESP I Settlement at 4. OCC is currently challenging the charges to consumers under the RSC in other proceedings and does not concede that DP&L is currently allowed, under the ESP I Settlement or otherwise, to charge customers for this stability charge.

<sup>6</sup> ESP I Settlement at 10-11.

<sup>7</sup> *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO, Finding & Order (Dec. 18, 2019).

obligation to freeze rates and instead charge consumers an additional \$121 million per year in base distribution rates.<sup>8</sup>

OCC filed a motion to dismiss this rate case, seeking to enforce the rate freeze found in the ESP I Settlement.<sup>9</sup> In its October 20, 2021 Entry, the PUCO denied OCC’s motion to dismiss. Notably, the PUCO did not address the issue of whether the rate freeze applies.<sup>10</sup> The PUCO denied the motion to dismiss on the grounds that the primary issue raised therein—whether the rate freeze remains effective—is better addressed at a later date, after a hearing is held on the merits of DP&L’s request for a rate increase.<sup>11</sup> At that time, if the PUCO rules that the rate freeze remains effective, any rate increase approved in this base distribution rate case “may ... be stayed as part of [the PUCO’s] determination in this case.”<sup>12</sup>

OCC believes that the PUCO could reasonably have interpreted the ESP I Settlement as justifying dismissal of this base distribution rate case. But OCC is not challenging the conclusion that the PUCO can (i) proceed to adjudicate this case on the merits, (ii) decide the rate freeze issue in conjunction with DP&L’s request for a rate increase, and (iii) if the PUCO agrees that the rate freeze is enforceable, stay the implementation of any rate increase until ESP I ends (or adopt some other remedy that adequately enforces the rate freeze for the protection of consumers).

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<sup>8</sup> See Application at 2 (Nov. 30, 2020) (“DP&L requests to increase its revenue requirement by \$120.8 million.”).

<sup>9</sup> Motion to Dismiss DP&L’s Application for a Rate Increase by Office of the Ohio Consumers’ Counsel (Aug. 5, 2021).

<sup>10</sup> See Entry ¶ 20 (“Assuming, without deciding, that OCC is correct that DP&L’s distribution rates should be frozen at current rates...”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

The Entry, however, is unlawful, unreasonable, unjust, and unwarranted<sup>13</sup> because it justifies denial of OCC’s motion to dismiss, in part, based on the following reasoning:

We find that the prescriptive statutory language is instructive as to our consideration of a motion to dismiss a rate case, noting that (1) the filing of the Staff Report is a significant threshold in the case, which occurs after substantial resources have been invested in the detailed review and consideration of the technical aspects of the rate application, and (2) *allowing consideration of filings other than Staff Report objections could allow a party to evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.* Here, the Staff Report was filed in this case on July 26, 2021, and the motion to dismiss was filed on August 5, 2021. *Accordingly, we find that a motion to dismiss is improper and should be denied.*<sup>14</sup>

On rehearing, the PUCO should modify the Entry to state that OCC’s motion to dismiss did not “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections” and that this does not form any basis for the denial of OCC’s motion to dismiss.

## II. ASSIGNMENT OF ERROR

**Assignment of Error: The PUCO erred in denying OCC’s motion to dismiss on the grounds that it might be deemed to “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.”**

The PUCO’s Entry is unlawful, unreasonable, unjust, and unwarranted because it concludes that it was proper to deny OCC’s motion to dismiss, in part, because it might be deemed to “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.”<sup>15</sup>

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<sup>13</sup> See R.C. 4903.10(B) (an application for rehearing must “set forth specifically the ground or grounds on which the application considers the order to be unreasonable or unlawful”; PUCO may abrogate or modify any order that it finds to be “in any respect unjust or unwarranted”).

<sup>14</sup> Entry ¶ 21 (emphasis added).

<sup>15</sup> Entry ¶ 21.

In ruling on the motion to dismiss, the PUCO stated that “allowing consideration of filings other than Staff Report objections could allow a party to evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objections.”<sup>16</sup> At first glance, this language might seem like cautionary dicta, putting parties on notice that they cannot evade the statutory objection process by filing other pleadings after the objection deadline. But following this statement, the Entry states that “*Accordingly*, we find that a motion to dismiss is improper and should be denied.”<sup>17</sup> Use of the word “*accordingly*” here implies that OCC’s motion to dismiss was denied, in part, because it sought to “evade the statutory deadline for objections by raising new issues in the motion that were not contained in the objection.” On rehearing, the PUCO should correct this error.

The Staff Report in this case was filed on July 26, 2021. Thus, the statutory deadline for objections was August 25, 2021 (30 days after the Staff Report).<sup>18</sup> OCC’s motion to dismiss was filed on August 5, 2021—twenty days before the deadline for objections. Thus, any conclusion that OCC’s motion to dismiss sought to “evade the statutory deadline” for objections is without record support.<sup>19</sup> Further, OCC filed timely objections to the Staff Report on August 25, 2021.<sup>20</sup> OCC’s first objection raises the same issue that was raised in the motion to dismiss, namely, enforcement of the ESP I rate freeze.<sup>21</sup> Thus, any conclusion that OCC’s motion to dismiss

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<sup>16</sup> Entry ¶ 21.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> R.C. 4909.19(C).

<sup>19</sup> R.C. 4903.09; *Indus. Energy Users-Ohio v. PUCO*, 117 Ohio St.3d 486, 493 (2008) (citing R.C. 4903.09 and stating that “the commission abuses its discretion if it renders an opinion on an issue without record support”).

<sup>20</sup> Objections to the PUCO Staff Report by Office of the Ohio Consumers’ Counsel (Aug. 25, 2021).

<sup>21</sup> *Id.* at 2 (“To protect consumers, the Staff Report should have recommended enforcement of the distribution rate freeze (no rate increase) that DP&L agreed to as part of a settlement with OCC, the Staff, and others in its ESP I case because ESP I is currently in effect, and the settlement requires a base distribution rate freeze for the duration of ESP I.”).

attempted to raise “new issues ... that were not contained in the objections” is likewise without record support.<sup>22</sup>

### III. CONCLUSION

OCC understands that whether the rate freeze applies and the appropriate way to enforce the rate freeze are issues that are preserved for later in this case. On rehearing, however, the PUCO should modify the October 20, 2021 Entry. The PUCO should rule on rehearing that the basis for denying OCC’s motion to dismiss does *not* include (i) evading the statutory deadline for objections nor (ii) raising new issues in the motion that were not contained in OCC’s objections.

Respectfully submitted,

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/s/ Christopher Healey  
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<sup>22</sup> R.C. 4903.09; *Indus. Energy Users-Ohio v. PUCO*, 117 Ohio St.3d 486, 493 (2008) (citing R.C. 4903.09 and stating that “the commission abuses its discretion if it renders an opinion on an issue without record support”).

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below *via* electronic transmission, this 19th day of November 2021.

*/s/ Christopher Healey* \_\_\_\_\_  
Christopher Healey  
Assistant Consumers' Counsel

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

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Summary: App for Rehearing Application for Rehearing by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Healey, Christopher