BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company.	))))	Case No. 17-957-EL-UNC

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

The PUCO's Finding and Order[1] fails consumers and is unlawful. The Finding and Order charges at-risk PIPP consumers electricity prices that are higher than those Dayton Power and Light Company's[2] ("DP&L") standard offer consumers pay. DP&L annually charges PIPP consumers $583.54[3] more than consumers on the standard offer. R.C. 4928.542 prohibits exactly that. The PUCO's interpretation[4] to the contrary harms the most vulnerable Ohioans and violates established principles of statutory interpretation and Ohio law.

Accordingly, under R.C. 4903.10, OCC applies for rehearing of its September 21, 2022 Finding and Order, which was unlawful in the following respects:

> ASSIGNMENT OF ERROR NO. 1: The PUCO erred and acted outside its authority when it failed to require DP&L to comply with R.C. 4928.542(B) and (C) and principles of statutory construction by authorizing DP&L to charge at-risk PIPP consumers electricity prices higher than those its standard service offer consumers pay.

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[1] Finding and Order (September 21, 2022).

[2] d/b/a AES Ohio.

[3] *In the Matter of the Application of the Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 22-556-EL-USF, OCC's Post-Hearing Brief (September 12, 2022) at 10.

[4] *See In the Matter of the Procurement of Standard Service Offer Generation for Customers of the Dayton Power and Light Company*, Case No. 17-957-EL-UNC (September 21, 2022).

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I. INTRODUCTION

The PUCO Finding and Order approving modifications to DP&L's auction process is unlawful. The PUCO allowed DP&L to hold a separate auction for PIPP consumers that will charge them an estimated $584 more per year (June 1, 2022 to May 31, 2023) than consumers served by DP&L's standard service offer pay. This violates R.C. 4928.542's plain meaning that generation prices *from each auction* charged to PIPP consumers cannot exceed their utility's standard service offer – "[t]he winning bid or bids . . . shall (B) Reduce the cost of the percentage of income payment plan program relative to the otherwise applicable standard service offer . . . ." The PUCO's finding that savings need accrue only "over the long term"[5] requires it to add words to R.C. 4928.542, which it has no authority to do. "The PUCO, as a creature of statute, has no authority to act beyond its statutory powers."[6] And the PUCO's action was unlawful because the PUCO construed an unambiguous statute which it should have simply applied. Further, when construing the statute, the PUCO violated Ohio's rules of statutory construction. It also

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[5] *Id.*

[6] *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51.

violated the legislature's intent as demonstrated by related statutes, which affect R.C. 4928.542's meaning.

The PUCO should grant OCC's Application for Rehearing as further explained below to protect at-risk PIPP consumers in the Dayton area from overpaying for electric utility service.

II. MATTER FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred and acted outside its authority when it failed to require DP&L to comply with R.C. 4928.542(B) and (C) and principles of statutory construction by authorizing DP&L to charge at-risk PIPP consumers electricity prices higher than those its standard service offer consumers pay.

R.C. 4928.54 provides: "The director of development services shall aggregate percentage of income payment plan program customers for the purpose of establishing a competitive procurement process for the supply of competitive retail electric service for those customers. The process shall be an auction." R.C. 4928.542 describes the requirements that the auction must meet. The plain, unambiguous language of R.C. 4928.542 prohibits DP&L's auction modifications. Although DP&L seeks to change the date of the auctions and the number of tranches involved in each auction, the PUCO should have gone further to require DP&L to meet R.C. 4928.542's requirements.

R.C. 4928.542 is plain and unambiguous. The statute provides as follows:

> [t]he winning bid or bids...s*hall* meet all of the following requirements:
>
> **(B)** Reduce the cost of the percentage of income payment plan program relative to the otherwise applicable standard service offer established under sections 4928.141, 4928.142, and 4928.143 of the Revised Code;

> **(C)** Result in the best value for persons paying the universal service rider under section 4928.52 of the Revised Code." (Emphasis added).

R.C. 1.42 provides that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." The PUCO has stated that "[p]ursuant to rules of statutory interpretation, statutes are to be interpreted based on the plain language of the statute…."[7] The Supreme Court of Ohio has held that "when interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent.[8] The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly.[9]

The word "shall" in the statute means there is no exception to the requirement that a winning bid reduce costs for PIPP consumers. "Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion."[10] Nothing in R.C. 4928.542 indicates "shall" means something other than its ordinary, mandatory usage. If a bid does not reduce rates for PIPP consumers, that bid violates the requirement that it "shall" do so. Finding otherwise requires the PUCO to add words to the statute. R.C. 4928.542 says nothing about bids reducing rates "over the long term." Adding this caveat violates Ohio's rules of construction. R.C. 4928.542 is unambiguous, which requires the

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[7] *In the Matter of the Application of the Ohio Development Services Agency for an Order Approving Adjustments to the Universal Service Fund Riders of Jurisdictional Ohio Electric Distribution Utilities*, Case No. 15-1046-EL-USF, Opinion and Order (October 28, 2015) at 20.

[8] *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12.

[9] *Id.; see also Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19.

[10] *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 108, 271 N.E.2d 834 (1971).

PUCO to apply its plain meaning that each auction must reduce rates for low-income PIPP consumers.

Even if the PUCO finds R.C. 4928.542 is ambiguous, it should not allow DP&L to charge PIPP consumers rates that exceed the SSO. R.C. 1.49 provides that "[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider . . . laws upon the same or similar subject." It is well-established in Ohio that statutes on the same subject matter should be interpreted together, rather than in isolation.[11] Courts call this principle *in pari materia*, which means "upon the same matter or subject."[12] *In pari materia* "instructs that statutes relating to the same subject 'be construed together, so that inconsistencies in one statute may be resolved by looking at [the] other statute on the same subject.'"[13] Courts "must harmonize and give full attention to all [related] statutes unless they are irreconcilable and in hopeless conflict."[14] The meaning courts give related statutes should carry out legislative intent.[15]

The PUCO should interpret Ohio law in a way that gives proper force and effect to each and all related statutes. It failed to do so in approving DP&L's proposed modifications, which results in a higher rate for low-income PIPP consumers than consumers on DP&L's standard service offer ("SSO"). In fact, PIPP consumers have not

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[11] *State v. Smith*, Ohio St.3d, 2022-Ohio-274, ¶ 30, quoting *Black's Law Dictionary* 911 (10th Ed. 2014). *See Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 1997- Ohio 395, 680 N.E.2d 997 (1997) (stating that the "maxim of *in pari materia* indicates that acts will be given full meaning and effect if they can be reconciled").

[12] *Black's Law Dictionary* at 791; *Ohio Furniture Co. v. Mindala*, 22 Ohio St.3d 99, 101, 488 N.E.2d 881, 883 (1986).

[13] *State v. Smith*, Ohio St.3d, 2022-Ohio-274, ¶ 30, quoting *Black's Law Dictionary* 911 (10th Ed.2014).

[14] *Johnson's Markets Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35, 567 N.E. 2d 1018 (1991); *Thomas v. Freeman*, 79 Ohio St.3d at 225.

[15] *Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 1997-Ohio-395, 680 N.E.2d 997 (1997). *State ex. rel O'Neil v. Griffith*, 136 Ohio St. 526, 17 Ohio Op. 160, 27 N.E. 2d 142 (1940).

received lower rates in the past two DP&L auctions. But statutes related to R.C. 4928.542 indicate the legislature intended for *every auction* to produce lower rates for low-income PIPP consumers.

First, R.C. 4928.02(L) states that, as a matter of Ohio policy, the PUCO and ODOD must "protect at-risk populations." DP&L's low-income PIPP consumers are vulnerable to poverty, food and housing insecurity, inflation, and a resurging pandemic. They are at-risk. Authorizing DP&L to charge low-income PIPP consumers higher rates than the standard service offer harms, rather than protects, an at-risk population. The doctrine of *in pari materia* requires the PUCO to adopt an interpretation of R.C. 4928.542 in step with its duty to protect at-risk populations. Reading R.C. 4928.542 to apply to every auction harmonizes similar statutes by ensuring vulnerable PIPP consumers are protected from *ever* paying higher prices than SSO consumers.

Another statute, R.C. 4928.02(A), supports interpreting R.C. 4928.542 to require that PIPP prices do not exceed the SSO at *any* auction. R.C. 4928.02(A) states that it is Ohio policy to ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service. DP&L's PIPP rates are unreasonably priced, as consumers with less ability to pay are charged more for the same service. They are also discriminatory to low-income PIPP consumers. An interpretation of R.C. 4928.542 that allows this puts related statutes in conflict and should be rejected. Requiring instead that PIPP rates not exceed a utility's SSO at every auction harmonizes R.C. 4928.542 with Ohio policy requiring reasonably priced electric service. Thus, *in pari materia* requires the PUCO to adopt this interpretation.

The plain meaning of R.C. 4928.542 requires mandatory savings for low-income PIPP consumers at each and every auction, not just over the long term. The PUCO's finding that savings can accrue over the long term requires adding words to the statute. The PUCO does not have this authority. The statute was unambiguous and should have been applied, not interpreted.

Further, principles of statutory construction require the PUCO to read like statutes together. This means R.C. 4928.02(A) and (L) add meaning to R.C. 4928.542. The PUCO should interpret R.C. 4928.542 in a manner that protects at-risk consumers and ensures reasonably priced electric service. Reading R.C. 4928.542 to prevent higher prices for PIPP consumers *at every auction* achieves this, so *in pari materia* demands this interpretation. But the PUCO interprets R.C. 4928.542 otherwise, allowing separate auctions for PIPP consumers that cost them more than SSO consumers pay. This violates Ohio law. Rehearing should be granted.

III. CONCLUSION

"[T]he purpose of the PUCO * * * is to protect the customers of public utilities."[16] The PUCO can protect the most vulnerable Dayton Area consumers by granting rehearing and rejecting or modifying the Finding and Order in this case. By law, electricity costs for PIPP consumers should not exceed the cost of the standard service offer. Requiring DP&L to procure generation for PIPP consumers as part of the SSO auction would ensure this outcome.

[16] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 372 (2009) (Pfeifer, J. dissenting).

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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 21st day of October 2022.

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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 Ms. Alana M. Noward on behalf of Michael, William J.