ORIGINAL

IN THE SUPREME COURT OF OHIO

In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	Supreme Court Case No. 14-1505
In re the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	Second Appeal from the Public Utilities Commission of Ohio
In re the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR
In re the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)	
In re the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)	

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JOINT MOTION TO DISMISS ASSIGNMENTS OF ERROR IN CROSS-APPEAL OF THE DAYTON POWER AND LIGHT COMPANY BY APPELLANTS INDUSTRIAL ENERGY USERS OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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JOINT MOTION TO DISMISS ASSIGNMENTS OF ERROR IN CROSS-APPEAL OF THE DAYTON POWER AND LIGHT COMPANY BY APPELLANTS INDUSTRIAL ENERGY USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Industrial Energy Users-Ohio (IEU-Ohio) and the Office of the Ohio Consumers' Counsel ("OCC") move, under S.Ct.Prac.R. 4.01(A), to dismiss Assignments of Error II and III of the Notice of Appeal of the Cross-Appellant Dayton Power and Light Company ("DP&L"). (R. 336). The Court should grant the motion because DP&L failed to comply with R.C. 4903.10, and as a result the Court lacks jurisdiction to consider the assignments of error. The grounds for this motion are more fully set forth in the Memorandum in Support of the Joint Motion to Dismiss.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
JOINT MOTION TO DISMISS
BY
THE INDUSTRIAL ENERGY USERS–OHIO AND
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

In the case below, the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued an Opinion and Order (R. 280), followed by an Entry Nunc Pro Tunc (R. 281), and five Entries on Rehearing addressing the terms and conditions initially ordered in the Opinion and Order. In the Opinion and Order and Entry Nunc Pro Tunc, the PUCO ordered DP&L, among other things, to phase in a competitive bidding process ("CPB") to secure generation service for its standard service customers. (R. 280 at 16; R. 281 at 2-3). The Commission further directed that DP&L divest its owned generation assets by May 31, 2017. (R. 281 at 2).

In response to the Opinion and Order and Entry Nunc Pro Tunc, DP&L filed an application for rehearing. (R. 285). In its application for rehearing DP&L did not seek rehearing of either the phase-in of the CPB or the date by which it was ordered to divest its generation assets. Other parties, however, did seek rehearing of the timing of the phase-in of the CBP and the divestiture of the generation assets. OCC urged the PUCO to accelerate the pace by which the SSO would be set by auction. (R. 283). Additionally, OCC and IEU-Ohio requested rehearing and a PUCO order directing DP&L to divest its generation assets more quickly. (R. 283, 290).

The PUCO initially granted rehearing allowing itself additional time to consider the applications filed. (R. 298). In its Second Entry on Rehearing (R. 316), the PUCO addressed the issues concerning the CBP and the divestiture of generation assets. There, the PUCO found that the deadline for DP&L to divest its generation assets should be modified due to new information provided in a supplemental application filed in DP&L's corporate divestiture case (Case No. 13-2420-EL-UNC). (R. 316 at 18). The PUCO ruled that DP&L should divest its generation assets no later than January 1, 2016. *Id.* This PUCO ruling moved up the divestiture by at least 18 months—from May 31, 2017 to no later than January 1, 2016. The Commission also accelerated the phase-in of the CBP so that the standard service offer generation would be procured wholly (100%) by auction by January 1, 2016. *Id.* at 18-19.

In response to the Second Entry on Rehearing, DP&L filed a second application for rehearing in which it alleged two errors were contained in the Second Entry on Rehearing. (R. 320). First, it asserted, "The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 17-18) to accelerate the deadline for DP&L to transfer its generation assets to January 1, 2016. The Commission should restore the May 31, 2017 deadline that it

established in its September 6, Entry Nunc Pro Tunc." (R. 320 at 1-2). It also asserted, "The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 18-19) to accelerate blending of the competitive bidding process. The Commission should restore the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc." *Id.* at 2.

Through its Third Entry on Rehearing, the PUCO again granted rehearing allowing itself additional time to consider the applications for rehearing. (R. 325). In its Fourth Entry on Rehearing the PUCO addressed DP&L's application for rehearing pertaining to the Second Entry. The PUCO denied DP&L's request to slow down the phase-in of the CBP. (R. 326 at 3-4). However, the Commission did grant rehearing to adjust the date by which DP&L must divest its generation assets. The PUCO changed the date, this time requiring DP&L to divest its generation assets by no later than January 1, 2017. *Id.* at 5-6.

DP&L did not file any additional application for rehearing after the PUCO issued its Fourth Entry on Rehearing. And it was there, that, for the first time, the PUCO established January 1, 2017 as the deadline for DP&L to divest its generation assets. OCC, however, filed a third application for rehearing addressing other issues (R. 328), which the PUCO denied. (R. 330).

After the PUCO denied OCC's third application for rehearing, the matter was final for purposes of an appeal. IEU-Ohio and OCC filed Notices of Appeal (R. 335, 337), and DP&L filed its Notice of Cross-Appeal (R. 336). In the Notice of Cross-Appeal, DP&L presents three assignments of error. This Joint Motion to Dismiss addresses the second and third assignments of error.

DP&L's Assignment of Error II states, "The ESP Orders are unlawful and unreasonable because the Commission accelerated its original deadline for DP&L to transfer its generation

assets from May 31, 2017 to January 1, 2017. (Error committed at Second Entry on Rehearing, pp. 17-18; rehearing denied in part at Fourth Entry on Rehearing, pp. 5-6)." (R. 336 at 3). Its Assignment of Error III states, "The ESP Orders are unlawful and unreasonable because they accelerated blending in the competitive bidding process both from the blending schedule proposed by DP&L and from the schedule originally established in the September 6, 2013 Entry Nunc Pro Tunc. (Error committed at Second Entry on Rehearing, pp. 18-19; rehearing denied at Fourth Entry on Rehearing, pp. 3-4)." *Id.*

DP&L did not set forth Assignment of Error II in an application for rehearing to the PUCO. *See* (R. 320). At no time did DP&L apply for rehearing on the grounds that the PUCO erred when it ordered DP&L to divest its generation assets by January 1, 2017 (in the PUCO's Fourth Entry on Rehearing (R. 326)). Additionally, Assignments of Error II and III do not provide any indication of what DP&L believes is unlawful or unreasonable about the PUCO's decision directing it to phase-in its CBP by January 1, 2016 or divest its generation assets by January 1, 2017. As a result, neither assignment of error "set[s] forth specifically the ground or grounds on which the [cross-appellant] considers the order to be unreasonable or unlawful." R.C. 4903.10. Because DP&L failed to comply with R.C. 4903.10, the assignments of error are not properly before the Court. Accordingly, they should be dismissed.

A. Because DP&L did not set forth Assignment of Error II of its Cross Appeal in an Application for Rehearing, the Court is without jurisdiction to consider it.

Under R.C. 4903.10, "[n]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application [for rehearing]." In addition, R.C. 4903.10 states that "[n]o cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or

corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing."

The requirement that a party seek rehearing of an issue from the PUCO before it seeks review on appeal in this Court is jurisdictional. If an appellant (or cross appellant) has failed to preserve an issue by first presenting it to the PUCO in an application for rehearing, the Court lacks jurisdiction to consider those arguments. *Consumers' Counsel v. Pub. Util. Comm.*, 144 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶40 (citing *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994); *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586, (1931), ¶6 of the syllabus).

In its applications for rehearing, DP&L did not apply for rehearing on what it now seeks the Court to review in Assignment of Error II. In that assignment of error, DP&L claims that "[t]he ESP Orders are unlawful and unreasonable because the Commission accelerated its original deadline for DP&L to transfer its generation assets from May 31, 2017 to January 1, 2017." (R. 336 at 3). DP&L did not raise this issue on rehearing at the PUCO. Rather, DP&L sought rehearing of the PUCO holding that required DP&L to transfer its generation assets by *January 1, 2016.* (R. 320 at 7). There, DP&L complained that the January 1, 2016 date was unreasonable and asked the PUCO to "restore the May 31, 2017 deadline" that was set through the PUCO's September 6, 2013 Entry Nunc Pro Tunc. *Id.* at 8.

In responding to DP&L's application for rehearing of the Second Entry on Rehearing, the PUCO did not grant DP&L's request to restore the May 31, 2017 deadline. (R. 326). Instead, the PUCO changed its Opinion and Order and issued a new deadline for DP&L to transfer its assets – setting, for the first time, the deadline as January 1, 2017. (R. 326 at 5-6). DP&L did not seek further rehearing on the PUCO's January 1, 2017 deadline for its asset transfer.

Because it has never filed an application for rehearing of the PUCO's decision setting January 1, 2017 as the asset transfer deadline, it may not urge that the PUCO's Order setting that deadline should be reversed, vacated, or modified. R.C. 4903.10. Accordingly, the Court should dismiss DP&L's Assignment of Error II.

B. Because Assignments of Error II and III fail to specify the grounds on which DP&L considers the PUCO's orders to be unreasonable or unlawful, the Court is without jurisdiction to consider them.

An appellant must state specifically the ground or grounds on which it considers the order it challenges to be unreasonable or unlawful. If the appellant fails to specifically allege how the PUCO acted unreasonably or unlawfully, is broad and general, and states no more than a conclusion, it fails to satisfy R.C. 4903.10. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59-60; *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954). For example, in *City of Marion*, the appellants claimed that "[t]he Commission did not have jurisdiction to hear the application of the company for increases in rates and charges and to make an order therein." 161 Ohio St. at 277. This Court held that the assignment of error may not be heard because the appellant failed to allege in what respect the PUCO lacked jurisdiction to hear and determine applications for increased rates. *Id.* at 278-79. The Court reasoned that "by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question." *Id.* at 279-80 (citing *City of Cincinnati v. Pub. Util. Comm.,* 151 Ohio St. 353, 378, 86 N.E.2d 10 (1949)).

Here, DP&L's Notice of Cross-Appeal fails to specify the ground or grounds on which it considers Assignments of Errors II and III to be unreasonable or unlawful. Assignment of Error II is merely a conclusory statement that the PUCO acted unreasonably and unlawfully in

accelerating "its original deadline for DP&L to transfer its generation assets from May 31, 2017 to January 1, 2017." (R. 336 at 3). The assignment of error fails to indicate the legal or factual error the PUCO committed. Likewise, in Assignment of Error III, DP&L asserts that the PUCO's orders are unreasonable and unlawful in that "they accelerated blending in the competitive bidding process both from the blending schedule proposed by DP&L and from the schedule originally established in the September 6, 2013 Entry Nunc Pro Tunc." *Id.* DP&L does not cite any law or reasoning that alerts the Court, the PUCO, or third parties as to the specific basis for its appeal.

In the assignments of error specified above, DP&L has "used a shotgun instead of a rifle" in raising its objections to the PUCO's orders. DP&L has stated only broad and general conclusions that do not specify the ground or grounds on which it considers the PUCO's Orders to be unreasonable or unlawful. DP&L has not stated any violation of law committed by the PUCO or any grounds for alleging that the PUCO's Orders are unreasonable.

In conclusion, DP&L has not complied with R.C. 4903.10. As a result, DP&L's Assignments of Error II and II are not properly before the Court. This Joint Motion requesting dismissal of these Assignments of Error should be granted.

Respectfully submitted,

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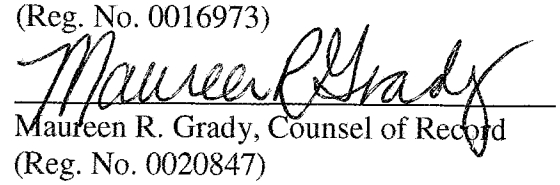

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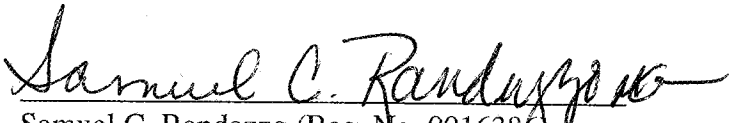

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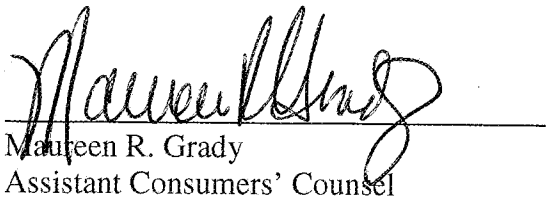
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Motion to Dismiss Assignments of Error in the Cross-Appeal of The Dayton Power and Light Company by Appellants the Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel was served upon the parties of record via electronic transmission this 31st day of October 2014.



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