

ORIGINAL

IN THE SUPREME COURT OF OHIO

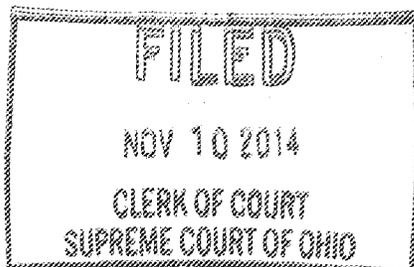
In the Matter of the Application of : Case No. 14-1505
The Dayton Power and Light Company for :
Approval of Its Electric Security Plan, etc. : Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities Commission of Ohio
: Case Nos. 12-426-EL-SSO,
: 12-427-EL-ATA,
: 12-428-EL-AAM,
: 12-429-EL-WVR, and
: 12-672-EL-RDR

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO 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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I. INTRODUCTION AND SUMMARY

Appellants Industrial Energy Users-Ohio ("IEU") and The Office of the Ohio Consumers' Counsel ("OCC") continue to bombard this Court with a series of frivolous papers concerning Pub. Util. No. 12-0426-EL-SSO.¹ They now argue that this Court cannot consider two assignments of error by The Dayton Power and Light Company ("DP&L"), both of which specifically identify (1) an error by the Public Utilities Commission of Ohio ("PUCO"), (2) the entry and pages on which that error occurred, and (3) the entry and pages on which the PUCO denied rehearing as to that error:

¹ On May 6, 2014, IEU filed a Complaint for Writs of Prohibition and Mandamus concerning that proceeding even though, as the Court later found, IEU "ha[d] an adequate remedy by way of appeal." *10/22/2014 Case Announcements*, 2014-Ohio-4629, p. 2. On October 14, 2014, IEU and OCC moved to stay the collection of the Service Stability Rider, which the PUCO authorized in that proceeding, without posting a bond as required by R.C. 4903.16.

- "II. 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).
- III. 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)."

Sept. 19, 2014 Notice of Cross-Appeal of The Dayton Power and Light Company ("Notice of Cross-Appeal"), p. 3.

Appellants erroneously argue that DP&L did not raise Assignment of Error II in an application for rehearing, and that Assignments of Error II and III are not sufficiently specific under R.C. 4903.10. Oct. 31, 2014 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 ("Joint Motion to Dismiss").

As demonstrated below, Appellants disregard the facts that (1) DP&L sought rehearing as to the deadline to separate its generation assets,² and (2) the Commission found that the issues raised in Assignments of Error II and III – which are the same issues raised in DP&L's

² April 18, 2014 Application for Rehearing of The Dayton Power and Light Company as to the Second Entry on Rehearing, R. 320, pp. 1-2 ("DP&L's Second Application for Rehearing") (seeking rehearing as to the PUCO's "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, 2013 Entry Nunc Pro Tunc.").

Second Application for Rehearing – are sufficiently specific under R.C. 4903.10.³ The Court should deny the Joint Motion to Dismiss and consider Assignments of Error II and III on the merits.

II. BACKGROUND

In the proceedings below, the PUCO modified and approved DP&L's application to establish a Standard Service Offer in the Form of an Electric Security Plan ("ESP") under R.C. 4928.143. Sept. 4, 2013 Opinion and Order, R. 280, p. 53. In approving the ESP, the PUCO ordered DP&L to divest its generation assets by May 31, 2017 and to implement a competitive bidding process ("CBP") by auctioning "10 tranches of a 41 month product commencing January 1, 2014, 30 tranches of a 29 month product commencing January 1, 2015, and 30 tranches of a 17 month product commencing January 1, 2016." Sept. 6, 2013 Entry Nunc Pro Tunc, R. 281, pp. 2-3.

Following applications for rehearing, the PUCO accelerated the deadline for DP&L to divest its generation assets from May 31, 2017 to January 1, 2016. Mar. 19, 2014 Second Entry on Rehearing (R. 316, pp. 17-18). The PUCO also accelerated the CBP by ordering DP&L to conduct an auction of "10 tranches of a 41 month product commencing on January 1, 2014, 50 tranches of a 29 month product commencing on January 1, 2015, and 40 tranches of a 17 month product commencing on January 1, 2016." *Id.* at 18-19.

³ July 23, 2014 Fifth Entry on Rehearing, R. 330, p. 4 ("R.C. 4903.10 requires that an application for rehearing 'shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.' DP&L's second application for rehearing stated it was seeking rehearing on two specifically enumerated grounds. The grounds upon which DP&L sought rehearing and the relief requested were clearly set forth with specificity and detail.").

In response to the PUCO's Second Entry on Rehearing, DP&L sought rehearing on the modified divestiture deadline and the CBP. DP&L sought rehearing on the following grounds:

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

DP&L's Second Application for Rehearing, R. 320, pp. 1-2.

The PUCO denied the relief requested in DP&L's Second Application for Rehearing. June 4, 2014 Fourth Entry on Rehearing (R. 326). However, the PUCO did move the deadline for DP&L to divest its generation assets from January 1, 2016 to January 1, 2017 (*i.e.*, it delayed the deadline, but did not delay the deadline to the May 31, 2017 date that DP&L requested). *Id.* at 5-6.

OCC sought rehearing, arguing that the PUCO had erred in extending the deadline for DP&L to divest its generation assets because DP&L allegedly "failed to assert the specific grounds for rehearing." July 1, 2014 Third Application for Rehearing by The Office of the Ohio Consumers' Counsel, R. 328, p. 2. The PUCO denied OCC's third application for rehearing:

"R.C. 4903.10 requires that an application for rehearing 'shall be in writing and shall set forth specifically the ground or grounds on

which the applicant considers the order to be unreasonable or unlawful.' DP&L's second application for rehearing stated it was seeking rehearing on two specifically enumerated grounds. *The grounds upon which DP&L sought rehearing and the relief requested were clearly set forth with specificity and detail.*"

Fifth Entry on Rehearing, R. 330, p. 4 (emphasis added).

In this appeal, DP&L has raised the issues raised in DP&L's Second Application for Rehearing and rejected by the PUCO in its Fourth Entry on Rehearing in Assignments of Error II and III:

- "II. 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.
- III. 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)."

Sept. 19, 2014 Notice of Cross-Appeal of The Dayton Power and Light Company, p. 3.

III. ASSIGNMENT OF ERROR II IS PROPERLY BEFORE THIS COURT BECAUSE DP&L SOUGHT TO ESTABLISH MAY 31, 2017 AS THE DEADLINE TO SEPARATE ITS GENERATION ASSETS IN ITS SECOND APPLICATION FOR REHEARING

Appellants ask this Court (pp. 4-6) to dismiss DP&L's Assignment of Error II because DP&L did not file an application for rehearing from the PUCO's Fourth Entry on Rehearing, which denied DP&L's request to extend the deadline for DP&L to divest its generation assets to May 31, 2017. Fourth Entry on Rehearing, R. 326, p. 5 (rejecting DP&L's

request to extend the deadline to May 31, 2017 and, instead, extending the deadline to January 1, 2017).

In other words, Appellants fault DP&L for not filing a third application for rehearing which would have sought precisely the same relief that DP&L sought in its Second Application for Rehearing (R. 320, pp. 1-2): a May 31, 2017 deadline to divest its generation assets. Specifically, DP&L had already filed an application for rehearing asking the Commission to move the deadline from January 1, 2016 to May 31, 2017. DP&L's Second Application for Rehearing, R. 320, pp. 1-2. In response, the Commission split the baby – it moved the deadline to January 1, 2017. Fourth Entry on Rehearing, R. 326, pp. 5-6. Under Appellants' theory, to preserve the issue for appeal, DP&L should have filed yet another application for rehearing that again asked the Commission to set a deadline of May 31, 2017. Appellants never explain why DP&L should have filed another application for rehearing asking for a deadline of May 31, 2017, when DP&L had already filed an application asking for that exact deadline, and the Commission rejected that application.

Indeed, Appellants provide no example in which a public-utilities litigant has been forced to seek rehearing on the same issue twice in order to preserve that issue for appeal. All that R.C. 4903.10(B) requires is that "[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]." Appellants cite *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 40, where this Court found that OCC had waived an issue that was not raised in *either* its application for rehearing *or* in its notice of appeal, and *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 175 N.E. 586 (1931), paragraph six of the syllabus, where this Court held only that "[t]he filing of an application for rehearing before the Public Utilities Commission

is a jurisdictional prerequisite to an error proceeding from the order of the Commission to this Court, and only such matters as are set forth in such application can be urged or relied upon in an error proceeding in this Court." Thus, neither case addresses the facts at issue here.

DP&L followed the requirements of R.C. 4903.10(B) by asking the PUCO, in its Second Application for Rehearing, to extend the deadline for DP&L to divest its generation assets to May 31, 2017. The PUCO denied that relief in its Fourth Entry on Rehearing, and therefore, DP&L has properly appealed that decision. Appellant's suggestion that DP&L should have filed *yet another* application for rehearing seeking *precisely the same* relief that DP&L sought in its Second Application for Rehearing is not required by R.C. 4903.10(B) and, moreover, would waste administrative resources.

IV. ASSIGNMENTS OF ERROR II AND III ARE PROPERLY BEFORE THIS COURT BECAUSE DP&L'S SECOND APPLICATION FOR REHEARING AND NOTICE OF CROSS-APPEAL SPECIFICALLY STATE THE GROUNDS ON WHICH THE PUCO'S SECOND ENTRY ON REHEARING IS UNLAWFUL AND UNREASONABLE

Appellants also argue that DP&L's Assignments of Error II and III are insufficiently specific under R.C. 4903.10(B). That argument is without merit.

Under R.C. 4903.10(B), an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Appellants argue that the grounds specified in DP&L's Second Application for Rehearing were insufficiently specific and that, therefore, DP&L's Assignment of Errors II and III are insufficiently specific under R.C. 4903.10(B). However, in the Joint Motion to Dismiss, Appellants *fail to mention* that the PUCO expressly found that the grounds raised in DP&L's Second Application for Rehearing were sufficiently specific under that statute.

Fifth Entry on Rehearing, R. 330, pp. 4-5. The PUCO explained, "DP&L's second application for rehearing stated it was seeking rehearing on two specifically enumerated grounds. *The grounds upon which DP&L sought rehearing and the relief requested were clearly set forth with specificity and detail.*" *Id.* at 4 (emphasis added).

For support, Appellants rely on *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 and *City of Marion v. Pub. Util. Comm.*, 161 Ohio St. 276, 278, 119 N.E.2d 67 (1954) (*per curiam*). In *Discount Cellular*, however, this Court found that the appellants could not challenge a standard that the PUCO had used to dismiss a complaint because the appellants' application for rehearing had stated only that "[t]he commission erred in dismissing the complaint because the commission is required by R.C. 4905.26 to hear complaints alleging violations of Ohio utility law." *Discount Cellular* at ¶ 57. In *Marion*, the insufficiently-specific assignment of error was that the PUCO "did not have jurisdiction to hear the application of the company for increases in rates and charges and to make an order therein." *Marion* at 277.

Here, there is no contention that DP&L has raised grounds to reverse the PUCO's Second Entry on Rehearing that do not appear in DP&L's Second Application for Rehearing or that DP&L has raised only vague jurisdictional arguments. On the contrary, DP&L's Second Application for Rehearing (R. 320, pp. 1-2) specifically identified the errors that DP&L now raises on appeal in Assignments of Error II and III, and DP&L cited to the entry and pages on which those errors occurred. OCC and IEU opposed DP&L's Second Application for Rehearing by litigating the merits of those errors, and the Commission sided with OCC and IEU on those issues. Fourth Entry on Rehearing, R. 326, pp. 3-6. Thus, it cannot reasonably be said that DP&L has not been sufficiently specific in its criticism of the Second Entry on Rehearing.

Moreover, if this Court were to find that DP&L's Second Application for Rehearing was not sufficiently specific to preserve the issues raised in DP&L's Assignments of Error II and III, the Court would reject established precedent of the PUCO. The PUCO has held that when an application for rehearing identifies what an applicant "consider[s] problematic with the Commission's decision and what [the applicant] want[s] the ultimate Commission decision to conclude[.]" then the application satisfies the specificity requirements of R.C. 4903.10(B). *In re Columbia Gas of Ohio, Inc.*, Pub. Util. Comm. Nos. 94-987-GA-AIR, *et al.*, Entry on Rehearing ¶ 11 (June 9, 2004) (application for rehearing was sufficiently specific when "a plain reading of the document indicate[d] that it set forth the items with which the . . . applicants took issue").

The Commission has further recognized that when an application for rehearing does not require the PUCO "to examine the document minutely, merely to discover the questions raised," the application satisfies § 4903.10(B). *In re Complaint of Yerian*, Pub. Util. Comm. No. 02-2548-EL-CSS, Entry on Rehearing, ¶ 15 (May 19, 2004), citing *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 97, 99, 232 N.E.2d 828 (1967) (*per curiam*) (application for rehearing was not sufficiently specific when it was necessary "to examine minutely an appellant's complaint before the commission, the order of the commission, appellant's application for rehearing" and other documents "merely to discover what questions [were raised] on appeal").

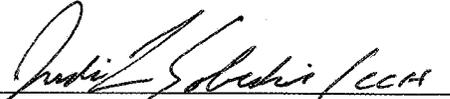
Here, DP&L's Second Application for Rehearing described two errors by the PUCO and identified the entry and pages on which those errors occurred. DP&L's Notice of Cross-Appeal raises the same errors, along with the entry and pages on which the PUCO denied rehearing as to those errors. Requiring even more detailed information would elevate form over substance and would create an unjustified procedural barrier to PUCO appeals.

V.

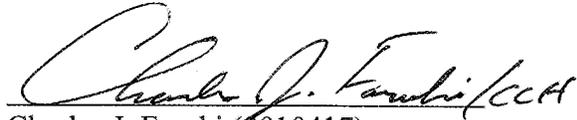
CONCLUSION

For the foregoing reasons, the Court should deny the Joint Motion to Dismiss.

Respectfully submitted,



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I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to 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 has been served via electronic mail, upon the following counsel of record, this 10th day of November, 2014:

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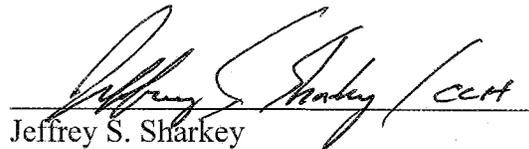
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