ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.	)))	Supreme Court Case No. 2014-1505
In the Matter of Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Second Appeal from the Public Utilities Commission of Ohio
In the Matter of 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 the Matter of Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)))	
In the Matter of Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	

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BRIEF URGING REVERSAL OF AMICI CURIAE
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND
EDGEMONT NEIGHBORHOOD COALITION
ON BEHALF OF APPELLANT OFFICE OF THE OHIO CONSUMERS' COUNSEL

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Proposition of Law No. 1: 3

The Public Utilities Commission of Ohio ("PUCO") violated Ohio Revised Code ("R.C.") 4928.38 and 4928.39 when it approved a $330 million subsidy for The Dayton Power and Light Company's ("DP&L") unregulated, competitive generation business, when these statutes require that the competitive generation business be fully unregulated and that DP&L receive no generation transition revenues or any equivalent revenues after the end of the market development period, which for DP&L terminated December 31, 2005.

Proposition of Law No. 2: 6

The PUCO violated R.C. 4928.14 and 4928.143(B)(2)(d) when it approved the $330 million subsidy as a charge related to "standard service offer", "default service", "stability", and "certainty", in order to evade R.C. 4928.38 and R.C. 4928.39 and subsidize DP&L's unregulated competitive generation business.

Proposition of Law No. 3: 8

The PUCO violated R.C. 4928.02(A), (H), and (L) when it unlawfully approved an anti-competitive subsidy to be paid by DP&L's captive distribution service customers to benefit DP&L's unregulated, competitive generation business while ignoring the requirements to provide affordable electric service and protect at-risk customers.

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I. INTRODUCTION

For purposes of assisting the Court in its review, Ohio Partners for Affordable Energy ("OPAE") and the Edgemont Neighborhood Coalition ("Edgemont") file this brief of amici curiae urging reversal pursuant to S.Ct Prac.R. 16.06. This brief supports the Appellant the Office of the Ohio Consumers' Counsel ("OCC").

OPAE is an Ohio non-profit corporation with the stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans. OPAE includes as members non-profit organizations located in the certified electric distribution service territory served by The Dayton Power and Light Company ("DP&L"), a public utility providing regulated electric distribution service as defined at Ohio Revised Code ("R.C.") Section 4905.03(E). OPAE members advocate on behalf of DP&L's low- and moderate-income customers and manage bill payment assistance programs to ensure customer access to regulated electric distribution service from DP&L. OPAE members also provide weatherization and energy efficiency services to DP&L customers. OPAE's non-profit members are themselves non-residential customers of DP&L

The Edgemont Neighborhood Coalition ("Edgemont") is a non-profit corporation based in a low-income, African-American neighborhood in Dayton, Ohio. Edgemont works to expand economic and education opportunities and improve the quality of life for its members and all residents of the neighborhood. Access to affordable electric service is a large concern of Edgemont members. Edgemont also functions as a small business, operating an office, storefront, community garden, and community computer center. Like OPAE, Edgemont has long been concerned with

utility matters and has actively participated in numerous cases before the Public Utilities Commission of Ohio ("PUCO").

OPAE intervened in these cases at the PUCO on April 13, 2012. Edgemont intervened in these cases at the PUCO on April 19, 2012. OPAE presented a witness, David C. Rinebolt, at the hearing. OPAE and Edgemont jointly filed a post-hearing brief on May 20, 2013 and a reply brief on June 5, 2013. After the PUCO's Opinion and Order was issued on September 4, 2013, OPAE and Edgemont jointly filed an application for rehearing on October 4, 2013. Appellant Office of the Ohio Consumers' Counsel's ("OCC") Appendix ("App.") 000001. The PUCO denied the OPAE/Edgemont application for rehearing in its Second Entry on Rehearing dated March 19, 2014. OCC App. 000068.

OPAE and Edgemont members and the low- and moderate-income residential customers and small commercial customers on whose behalf OPAE and Edgemont advocate will be forced to continue to pay unlawful charges for the provision of retail electric service if the Court does not reverse the PUCO's orders. OPAE and Edgemont urge the Court to reverse the PUCO's unlawful orders for the reasons set forth in this brief of amici curiae urging reversal and submitted in support of the Appellant Office of the Ohio Consumers' Counsel.

II. ARGUMENT

Proposition of Law No. 1

The PUCO violated R.C. 4928.38 and 4828.39 when it approved a $330 million subsidy for The Dayton Power and Light Company's ("DP&L") unregulated, competitive generation business and when these statutes require that electric generation be fully deregulated and that DP&L receive no generation transition revenues or any equivalent revenues after the end of the market development period, which for DP&L terminated December 31, 2005.

The PUCO allowed DP&L to recover a fixed charge on all captive customers of DP&L's non-competitive, regulated distribution utility service to subsidize the competitive, unregulated generation business of DP&L. The PUCO granted DP&L this unlawful subsidy because the PUCO accepted DP&L's claims that its returns on equity would decrease during the years of the electric security plan ("ESP") due to declining energy and capacity generation prices in the competitive market, significant increases in customer switching from its generation to other suppliers in the competitive market, and its transition to procurement through an auction of all the generation necessary to arrange the standard service offer ("SSO") generation supply. The claim that customers of DP&L's regulated distribution utility must pay a subsidy to offset the declining profits of its unregulated, competitive generation business should have been dismissed from the outset because the PUCO has no statutory authority to allow such a subsidy. However, the PUCO approved the subsidy in violation of Ohio law.

The PUCO's order violates R.C. 4928.38 and 4928.39. OCC App. 000148, 000149. These statutes, enacted in 1999, allowed Ohio public utilities to collect transition revenues as the utilities transitioned from being regulated providers of both generation and distribution service to being solely regulated distribution utilities. After 1999, generation was to be purchased in the competitive generation market. R.C. 4928.38 gave the utilities the opportunity to collect transition revenues to allow for their

above-market generation costs, which would not be collected in the competitive generation market. Under R.C. 4928.39, transition costs are the above-market generation costs that the utility would have recovered under regulation of generation but could not recover in the competitive generation market. Under R.C. 4928.38, the utility may not receive any transition revenues or any equivalent revenues after the end of its market development period, which for DP&L ended on December 31, 2005. In Ohio, retail electric generation is a competitive service, and the prices for the service are market based. The owners of electric generation are wholly on their own in the competitive generation market.

Given the precision of the law, the PUCO could not call the subsidy to DP&L's unregulated generation business a transition charge. The words "transition charge" could not be used when such charges explicitly ended December 31, 2005. In its Second Entry on Rehearing, the PUCO claimed that the subsidy was not a transition charge because, pursuant to R.C. 4928.39, transition charges are cost-based and the subsidy provided to DP&L was not cost-based. OCC App. 000068; Second Entry on Rehearing at 6. According to the PUCO, the subsidy was based on what DP&L needed to maintain its "financial integrity". Id. The PUCO attempted to side-step the law by changing the words used to name the subsidy from "transition charge" to a "financial integrity" charge. Id.

Counter to the PUCO, the justifications for the subsidy, such as future generation price decreases, increased customer shopping for generation, and the transition to auctions for procuring SSO generation supply, are all related exclusively to DP&L's unregulated competitive generation business. DP&L claimed that its "financial integrity" would be threatened by the declining market price of generation and increased shopping for generation by its customers over the next several years. The claims were all based on the expected lower profits of the competitive generation business. Under Ohio law, the

profits of DP&L's competitive generation business are not a matter of the PUCO's concern.

The subsidy compensates DP&L for costs it cannot collect in the competitive generation market, and thus the subsidy serves the same purpose as transition revenues. The subsidy will permit DP&L to collect revenues from captive distribution customers to compensate DP&L for declining generation revenues due to competition. The subsidy represents the very same transition revenues that under R.C. 4928.39 may no longer be collected from ratepayers after December 31, 2005. The subsidy is designed to compensate DP&L for the challenges of the competitive retail generation business. The subsidy was justified solely by DP&L's generation business losses. In Ohio, retail generation is subject to competition and market prices. The PUCO is precluded by law from authorizing utilities to collect any above-market generation transition charges or equivalent revenues after 2005. R.C. 4928.38 and 4928.39. The PUCO does not have statutory authority to protect DP&L's sole shareholder, the Virginia-based holding company AES, from the decline in the profits of DP&L's competitive generation business.

DP&L's competitive generation business is now fully on its own. The PUCO is a creature of statue and may only exercise the authority given to it by the General Assembly. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio State 2d 153, 164, 166. Even if the PUCO recognized its lack of authority by avoiding the words "transition revenues" when it approved the subsidy, the subsidy is simply approval for DP&L to collect $330 million from captive distribution customers to compensate DP&L for its losses in the competitive generation market. This is unlawful. R.C. 4928.38 and 4928.39. The PUCO's order allowing a $330 million subsidy for DP&L's generation business must be reversed.

Proposition of Law No. 2:

> The PUCO violated R.C. 4928.14 and 4928.143(B)(2)(d) when it approved the $330 million subsidy as a charge related to "standard service offer", "default service", "stability", and "certainty," in order to evade R.C. 4928.38 and R.C. 4928.39 and subsidize DP&L's competitive generation business.

According to the PUCO, the subsidy was approved to provide DP&L stable revenue to maintain its financial integrity, in order to meet its obligation to provide a "standard service offer". The PUCO claimed that the subsidy was allowed under R.C. 4928.143(B)(2)(d) because it is a charge related to "default service" and will have the effect of "stabilizing" and "providing certainty regarding retail electric service". Second Entry on Rehearing at 7; Opinion and Order at 21-22. OCC App. 000068, 000001.

Describing the subsidy using these "magic" words from R.C. 4928.143(B)(2)(d) is meant to evade the PUCO's lack of authority to subsidize competitive generation. According to the PUCO, DP&L needed "stable" revenues to maintain its "financial integrity" to "meet its obligation to provide a standard service offer". The PUCO failed to recognize that the standard service offer is a competitive product under Ohio law. In R.C. 4928.141, the General Assembly defined "standard service offer" as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service". OCC App. 000129. The "standard service offer" is explicitly defined in the law as "all competitive retail electric services". R.C. 4928.141. No subsidy passing through the regulated distribution utility can be used to maintain the competitive standard service offer.

Grasping for straws, the PUCO also referred to "default service", which occurs when a competitive generation supplier fails to provide generation service to a customer so that the customer defaults to the competitive standard service offer until the customer chooses another competitive generation supplier. R.C. 4928.14. OCC App. 000128. The customer defaults to the standard service offer, which in this case was established by an

Electric Security Plan ("ESP") under R.C. 4928.143 until the customer chooses another competitive generation supplier. Unlike the "standard service offer", the "default service" has been defined to include both competitive and non-competitive cost components. As a provider of default service, the distribution utility simply passes through to the customer the cost of the competitive generation component of the default service. The distribution utility provides the default service, but the distribution utility does not provide the competitive generation service component of the default service.

R.C. 4928.143(B)(2)(d) contains all the magic words used by the PUCO to justify approval of a subsidy for DP&L's competitive generation business. The statute states that the ESP may include charges for "default service" as would have the effect of "stabilizing or providing certainty regarding retail electric service". OCC App. 000130. But if DP&L were to receive a subsidy for its role in providing "default service", it would have to justify the subsidy in terms of the cost of providing "default service', including non-competitive components as well as the competitive components of retail electric service. DP&L made no such showing. The $330 million subsidy is designed to offset the losses of DP&L's competitive generation business, not default service.

The subsidy granted DP&L is not related to DP&L's role in the provision of "default service" under R.C. 4928.143(B)(2)(d) because the subsidy does not represent revenues to provide retail electric service, including the non-competitive components that are a part of default service. The subsidy was justified on the basis of the declining revenues of the competitive generation business.

The PUCO cannot re-write the law. The PUCO invoked "default service", "standard service offer", "financial integrity", "certainty" and "stability" to evade its lack of authority to approve a subsidy solely for DP&L's competitive generation business. No statute gives the PUCO authority to subsidize DP&L's competitive generation business. Ohio statutes forbid such a subsidy. The PUCO's attempt to interpret the words of R.C. 4928.143(B)(2)(d) to justify approving the competitive generation subsidy is unlawful.

The Court must reverse the PUCO's order approving a subsidy for DP&L's competitive generation business.

Proposition of Law No. 3

> The PUCO violated R.C. 4928.02(A), (H), and (L) when it unlawfully and unreasonably approved an anti-competitive subsidy paid by the captive customers of the distribution utility to benefit the unregulated, competitive generation business while ignoring the requirements to provide affordable electric service and protect at-risk customers.

The subsidy approved by the PUCO does not comport with the policies of the state of Ohio as set forth at R.C. 4928.02. OCC App. 000125. Specifically, R.C. 4928.02(H) declares that it is the state's policy to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. R.C. 4928.02(H). OCC App. 000125. The PUCO violated this state policy when it required DP&L's captive utility distribution customers to subsidize DP&L's unregulated, competitive generation business. The subsidy from DP&L's regulated distribution service to a particular competitive market participant, DP&L's unregulated generation business, is unlawful. The non-bypassable generation-related subsidy paid by DP&L's monopoly distribution customers is inconsistent with the regulatory principles and the policy of the state of Ohio that prohibit a subsidy from the regulated distribution utility to the non-regulated, competitive generation business. R.C. 4928.02(H); OCC App. 000125. It is unlawful for DP&L's captive distribution customers to be forced to provide a guaranteed revenue stream to DP&L's competitive generation business.

The subsidy is also inconsistent with the state policy of ensuring the availability of reasonably priced retail electric service. R.C. 4928.02(A). OCC App. 000125. R. C.

Section 4928.02(A) states that it is the policy of the state to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." OPAE witness David C. Rinebolt and OCC witness James D. Williams testified that DP&L's current rates are already among the highest in the state. OPAE Hearing Exhibit 1, Transcript Volume X at 2561; OCC Hearing Exhibit 19; Transcript Volume VI at 1501. This testimony demonstrated that DP&L's rates were already unaffordable for approximately one-third of DP&L's residential customers. Given the unaffordability of DP&L's electric service, it was unreasonable as well as unlawful for the PUCO to hand DP&L a subsidy for its unregulated generation business rather than have the competitive generation market establish the cost of generation. When the subsidy was approved, the monthly bill, already unaffordable for one-third of DP&L's residential customers, remained unaffordable. DP&L's electric service is not reasonably priced, a violation of Ohio law. R.C. 4928.02(A).

The subsidy also failed the state policy of protecting at-risk populations as set forth at R.C. 4928.02(L). OCC App. 000125. The subsidy increased the financial burdens on all customers, and particularly on those low-income residential customers who are at great risk of losing electric service. The subsidy makes electric service even less affordable for at-risk customers in DP&L's service territory. Poverty has increased in DP&L's service territory as has the number of low-income customers. Disconnections, extended payment plans, and defaults on extended payment plans will continue to be among the highest in the state. The subsidy will further harm at-risk populations, not protect them, as the state's policy provides. The subsidy makes a bad situation even worse.

The PUCO did not ignore all of the policies listed by the General Assembly at R.C. 4928.02 but selectively invoked the policies to grant the requests of DP&L and certain favored intervenors. In finding that the "competitive retail enhancements" advocated by competitive retail electric suppliers ("CRES") were a "qualitative benefit" of the ESP, the PUCO modified the ESP to provide DP&L with incentives to modernize its billing system. The PUCO did not ignore the testimony of witnesses who contended that DP&L's billing system was antiquated and incapable of supporting rate-ready billing and percentage-off-the-price-to-compare, two common competitive generation pricing options. Opinion and Order at 51. OCC App. 000001. The PUCO found that billing-system modernization would allow CRES providers to offer a more diverse range of products to customers consistent with the provisions of R.C. 4928.02(B), the policy of the state to ensure the availability of electric service from suppliers that meet consumers' needs. Id.

The PUCO found that the "competitive retail enhancements, the billing system modernization, and the economic development provisions" of the ESP would encourage economic development and improve the state's competitiveness in the global market as provided in the state's policy at R.C. 4928.02(N). The PUCO also found that the ESP provided DP&L with incentives to submit a plan to modernize its distribution infrastructure in accordance with the state's policy at R.C. 4928.02(D), which encourages innovation in such services as smart grid and advanced metering infrastructure, and the state's policy at R.C. 4928.02(E), which encourages access to the transmission and distribution systems of electric utilities in order to promote customer choice. Opinion and Order at 52. OCC App. 000001.

The PUCO did not ignore all of the policy of the state of Ohio. In fact, the PUCO relied on the policy of the state to justify additional costs to all customers associated with the provisions of the DP&L application and some parties' proposals. While advancing state policies it favored, the PUCO simply disregarded the policies of the state that speak to reasonably-priced service, affordability, and the protection of at-risk customers. In its Opinion and Order, the PUCO ignored the policy set forth at R.C. 4928.02(L) to protect at-risk populations. The PUCO also ignored the evidence presented at the hearing in support of action to support at-risk populations in accordance with R.C. 4928.02(L).

OPAE and Edgemont filed their application for rehearing on October 4, 2013, to address the fact that the PUCO had ignored their evidence of a need to protect at-risk populations. In its Second Entry on Rehearing, the PUCO claimed falsely that it had considered the record evidence presented by OPAE and OCC on affordability and the protection of at-risk customers but found that "certainty" and "stability" of electric rates in DP&L's service territory benefited at-risk customers as well as other customers. The PUCO claimed that evidence of the impact of the ESP on at-risk customers failed to examine the negative impact on the electric utility, as well as other customers, if rates were reduced or if other options to protect at-risk customers, such as bill payment assistance in the form of a fuel fund as proposed by OPAE and OCC, were approved. The PUCO also claimed that if it had failed to authorize the subsidy for DP&L's competitive generation business, it would have decreased DP&L's capability to provide safe, reliable, and certain retail electric service and that this would have had severe negative consequences on at-risk customers as well as all other customers. Second Entry on Rehearing at 33. OCC App. 000068.

Thus, the PUCO found that as long as it was subsidizing DP&L's competitive generation business, the PUCO was doing its job. The issues of reasonably-priced service and protection of at-risk customers were resolved by making electric service even more unaffordable and by protecting the financial integrity of DP&L's competitive generation business instead of protecting at-risk customers. This is a perversion of Ohio law.

The PUCO violated R.C. Section 4928.02 by ignoring R.C. 4928.02(A), (H), and (L). It is the policy of the state of Ohio to assure reasonably-priced electric service, to prevent subsidies from the regulated distribution utility to competitive generation providers, and to protect at-risk populations. While the PUCO relied on R.C. 4928.02 to grant requests of DP&L and favored intervenors, the PUCO ignored the requests of OPAE and Edgemont pursuant to R.C. 4928.02(A) and (L). The policies articulated by the General Assembly require that retail electric generation service be competitively priced and vulnerable customers be protected from rate increases resulting from the provisions of an ESP. The PUCO's order violates the law and must be reversed.

III. CONCLUSION

The PUCO has no authority to ignore and violate Ohio law. As the Court has found, the PUCO is a creature of the General Assembly and cannot ignore statutes and legislate in its own right. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio State 2d 153, 164, 166. To paraphrase the Court in that case, the PUCO "cannot transform" an unlawful generation subsidy to a competitive generation business into a lawful charge. In addition, the PUCO cannot ignore the policy of the state of Ohio set forth in statute. The PUCO must follow the law.

Wherefore, Amici Curiae, Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition, respectfully submit that the PUCO's Opinion and Order and Entry on Rehearing approving a subsidy for DP&L's competitive generation business are unlawful, unjust, and unreasonable and should be reversed. This case should be remanded to the PUCO with instructions to correct the errors complained of herein. Specifically, DP&L's captive distribution customers should not pay the subsidy to DP&L's competitive generation business and vulnerable customers should be protected from illegal subsidies.

Respectfully submitted,

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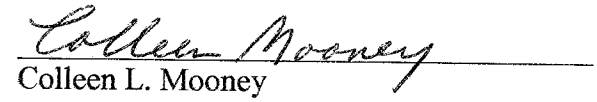
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amici Curiae Brief of Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition was served via e mail upon the parties of record this 1st day of December 2014.



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