FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	:	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	:	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	:	Case No. 12-672-EL-RDR

MOTION OF APPLICANT THE DAYTON POWER AND LIGHT COMPANY TO CONTINUE BRIEFLY CURRENT RATES UNTIL IMPLEMENTATION OF TERMS OF A COMMISSION ORDER

Pursuant to Ohio Rev. Code § 4928.141, Applicant The Dayton Power and Light Company ("DP&L") moves for an Order that will continue DP&L's current rates during 2013, until the Commission has issued an Opinion and Order in this proceeding and DP&L has had time to implement the Order. This Motion explains what should happen in the event that the Commission issues an Order in this case at a date that is too late for DP&L to implement the Order as of January 1, 2013. The Commission should grant this Motion so that DP&L can continue to recover its current rates during 2013 until DP&L can implement a Commission Order in this case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION OF APPLICANT THE DAYTON POWER AND LIGHT COMPANY TO CONTINUE BRIEFLY CURRENT RATES UNTIL IMPLEMENTATION OF TERMS OF A COMMISSION ORDER

I. INTRODUCTION AND SUMMARY

DP&L's current rate plan provides that "[t]he parties agree to extend DP&L's current rate plan through December 31, 2012." February 24, 2009 Stipulation and Recommendation, ¶ 1 (Case No. 08-1094-EL-SSO). Accord: id. ¶ 3. All of DP&L's current generation rates (base generation, EIR, RSC) were thus set through 2012. On March 30, 2012, DP&L filed an Application in this case to establish new rates pursuant to Ohio Rev. Code § 4928.142, through a market rate offer ("MRO") beginning January 1, 2013. The Commission's Staff encouraged DP&L to withdraw its MRO Application, and instead, to file an Application to establish an Electric Security Plan ("ESP"). After several months of attempting to settle the MRO case, DP&L decided to agree to that request. DP&L thus withdrew its MRO Application and filed an Application to set its SSO rates through an ESP.

Since all of DP&L's rates were set through 2012, and since the end of the year is approaching, there is a possibility that this case will not be resolved in time for DP&L to conduct a competitive bidding process and to implement the resulting rates by January 1, 2013. (Indeed, DP&L proposed a procedural schedule that would have allowed a Commission decision by year-end, but some of the intervenors are instead seeking a hearing date in February, 2013.) DP&L thus asks this Commission to enter an Order continuing DP&L's existing rates into 2013 until the results of a competitive bidding process can be implemented. DP&L commits to acting with all due speed so that competitive bidding and the resulting rates will be implemented as soon as reasonably possible.

DP&L thus asks the Commission to issue an Order that DP&L's current rates shall continue (for what DP&L anticipates to be only a short time) in 2013 until DP&L has had time to implement any final Order that the Commission issues in this case.

II. THE COMMISSION SHOULD RESOLVE THIS CASE AS RAPIDLY AS REASONABLY POSSIBLE

As an initial matter, the Commission should set a schedule that would resolve this case as rapidly as reasonably possible, for at least two reasons:

First, DP&L's financial integrity would be threatened if there were a delay in approval of DP&L's ESP II Application. For any period of time during 2013 that DP&L's current rates are in effect, it will earn a return on equity ("ROE") of [redacted]%. Chambers Dec., Attachment WJC-I (expected switching; assumes that all of DP&L's current rates, including RSC, continue until the ESP II Application is approved). A [redacted]% ROE is below the range needed to maintain DP&L's financial integrity and is well below the reasonable ROE range of 7% to 11% that this Commission approved recently in AEP's ESP proceeding.[1] DP&L thus needs to have its ESP II approved promptly to maintain its financial integrity in 2013. Therefore, this Commission should establish an expedited schedule in this case.

Second, the intervenors would not be prejudiced if the Commission decided DP&L's ESP II Application on an accelerated basis because the ESP II Application is very similar to DP&L's MRO Application (which was filed on March 30, 2012). The similarities between the two applications include:

1. Both seek to blend DP&L's current rates with rates set through a CBP pursuant to a blending schedule;

[1] Opinion & Order, p. 33 (Case No. 11-346).

2. Both have substantially identical plans for a CBP;

3. Both seek to have a nonbypassable stability charge;

4. Both seek to implement substantially the same rate structure and riders;

5. Both have testimony from the following witnesses on substantially the same subjects: Claire Hale, Aldyn Hoekstra, Craig Jackson, Teresa Marrinan, Nathan Parke, Emily Rabb, Dona Seger-Lawson, and Judi Sobecki.

The intervenors thus would not be prejudiced by an accelerated schedule, as the two Applications are substantially similar.[2] Moreover, DP&L is willing to allow relevant discovery already conducted in the MRO but updated for the ESP to be used in this ESP proceeding.

III. IF THE COMMISSION CANNOT RESOLVE THIS CASE THIS YEAR, THEN THE COMMISSION SHOULD DENY THE JOINT MOTION

DP&L demonstrates below (in subsection A) that if the Commission cannot resolve this case this year, then the Commission should continue DP&L's existing rates during 2013 until new rates can be implemented, for two separate and independent reasons: (1) Ohio law mandates that DP&L's existing rates continue until a new SSO has been approved by the Commission; and (2) the delays that have occurred in this proceeding are the product of good-faith actions by DP&L (including DP&L's good faith efforts to settle this case, and DP&L's decision to comply with the suggestion of the Commission's Staff that DP&L withdraw its MRO application and file an ESP Application), and the Commission should not penalize DP&L for acting in good faith.

On September 26, 2012, and October 18, 2012, several of the intervenors in this case filed a Joint Motion and a Reply in support of that motion in which they argue that DP&L's

[2] As discussed in DP&L pending Motion for Protective Order, the the ESP filing involves different financial projections and data, which should remain confidential.

current rates should continue into 2013, but that the RSC should be eliminated or somehow deemed bypassable. DP&L demonstrates below (in subsection B) that the Commission should reject the various new arguments made in the Joint Movants' Reply.

A. THE COMMISSION SHOULD EXTEND DP&L'S RATES

The Commission should issue an Order that continues DP&L's existing rates during 2013 until the Commission issues an Order on DP&L's ESP Application for each of the following reasons:

1. Ohio Law: As an initial matter, Ohio law mandates that DP&L's current rates continue until a new ESP is approved by the Commission. Specifically, Ohio Rev. Code § 4928.141(A) states:

> "Only a standard service offer authorized in accordance with section or of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section or of the Revised Code, and, as applicable, pursuant to division (D) of section of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term." (Emphasis added.)

Further, Ohio Rev. Code § 4928.143(C)(2)(b) states:

> "If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." (Emphasis added.)

The Ohio Revised Code thus establishes that the terms of DP&L's ESP I -- including the RSC -- shall continue until a new ESP is approved. Indeed, the Joint Movants have repeatedly conceded that DP&L's current ESP rates must continue until a new ESP is approved. September 26, 2012 Joint Motion Seeking Enforcement of Approved Settlement Agreements ("Joint Motion"), p. 4 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); October 18, 2012 Reply to Memorandum of The Dayton Power and Light Company ("Reply"), p. 5 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); October 16, 2012 Joint Memorandum Contra Dayton Power and Light Company's Proposed Procedural Schedule ("Joint Memorandum"), p. 4 ("Ohio law provides that if another SSO is not approved prior to December 31, 2012, when DP&L's current ESP I was otherwise anticipated to terminate, DP&L's current SSO would simply continue").

The Commission should therefore extend DP&L's current ESP rates, including the RSC, until the Commission has approved DP&L's pending ESP Application.

2. DP&L has acted in Good Faith: The reasons that this proceeding may extend into 2013 are (a) that DP&L made good faith efforts to settle its MRO filing; and (b) that DP&L complied with the Staff's request that DP&L withdraw its MRO Application and file an ESP Application.

Specifically, in comments that the Commission's Staff filed regarding DP&L's MRO Application, Staff encouraged DP&L to withdraw its MRO Application and to file an ESP Application. April 27, 2012 Comments submitted on behalf of The Public Utilities Commission of Ohio, p. 26 ("Staff believes that the Applicant should consider submitting an Electric Security

Plan pursuant to R.C. 4928.143. Although either an electric security plan or a market rate option would fulfill the obligation under R.C. 4928.141, the electric security plan can offer significant advantages for the Applicant, the ratepayers of the Applicant and the public at large. . . . Staff recommends that Applicant strongly consider building on the successful electric security plan rather than proceed with the somewhat more limited market rate option.").

After the Staff Comments were issued, and consistent with DP&L's history of settling rate-plan cases, DP&L engaged in extended settlement efforts in an attempt to settle its MRO Application. Over a period of several months, DP&L circulated multiple settlement proposals to the intervenors and the Commission's Staff, and met with them on multiple occasions at the Commission's offices to discuss each proposal. Further, DP&L invited all of the parties to contact DP&L if they wished to discuss settlement, and many parties have contacted DP&L; DP&L thus had many individual settlement-related conversations.

Those settlement negotiations prolonged DP&L's MRO Application significantly, because the intervenors requested -- and DP&L agreed -- that multiple hearing dates be cancelled while DP&L's MRO application was pending so that the parties could focus on trying to settle DP&L's case. Further, the parties to DP&L's MRO case had been actively involved in hearings related to AEP's and FirstEnergy's earlier-filed rate-plan cases. As a result, those counsel at times had very limited time available to discuss settlement with DP&L.

Eventually, it became apparent that the parties were not going to be able to reach a settlement of DP&L's MRO Application. DP&L thereafter filed a notice withdrawing its MRO Application and began extensive work to file its ESP Application. (Its employees worked many long hours, including evenings and weekends to file an ESP Application on short notice.)

Finally, the Joint Movants claim (Reply, p. 5) that DP&L's "unilaterally-made decisions" are what created the possibility that this case may extend into 2013. That claim is false and misrepresents the facts. The truth is that the Joint Movants asked DP&L to agree to cancel prior hearing dates to permit settlement discussions, and the Staff asked DP&L to withdraw its MRO Application and to file an ESP Application. The Joint Movants apparently want to eat their cake and have it too. The Commission should disregard the Joint Movants' criticisms of DP&L's conduct that complied with requests made by the Joint Movants.

In short, the delays that have occurred in this proceeding are a result of DP&L's good faith efforts to settle its MRO Application and DP&L's decision to comply with the Staff's request that it withdraw its MRO Application and file an ESP Application. The Commission should not penalize DP&L for its good-faith conduct.

Finally, DP&L commits to acting with all due speed once a Commission Order is issued as to DP&L's ESP Application. After an Order approving DP&L's ESP Application, DP&L commits to implement a competitive bidding process in eight weeks and implementing the results of the competitive bid in four weeks thereafter.

B. THE COMMISSION SHOULD REJECT THE ARGUMENTS MADE BY THE JOINT MOVANTS THAT THE COMMISSION SHOULD ELIMINATE THE RSC

The Joint Motion and the supporting Reply (which contains many arguments that were not made in the Joint Motion; it is improper to include totally new arguments in a reply memorandum, but DP&L responds to them here) argue that DP&L's existing rates should continue, but that the RSC should be eliminated or deemed bypassable. The Commission should reject that position for the following separate and independent reasons:

1. Ohio Law: As an initial matter, the Joint Movants have repeatedly conceded that Ohio law establishes that DP&L's existing SSO rates must continue until the Commission approves a new SSO.[3] The Joint Movants have thus conceded that the relief they seek -- continuation of DP&L's existing rates, but elimination of the non-bypassable RSC -- is barred by Ohio law. The Commission thus need not consider any of the other arguments made by the Joint Movants. DP&L nonetheless addresses those arguments below; as demonstrated below, none of the arguments have any merit.

2. Financial Integrity/A Taking: The Commission must establish rates that are "just and reasonable." Ohio Rev. Code § 4905.22. The Supreme Court of Ohio has stated:

> "In determining whether a rate order is just and reasonable (and thus constitutionally permissible), the [United States Supreme Court in Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281 (1944)] required a balancing of investor and consumer interests. With respect to the investors' interest, the court stated:
>
> '. . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.'"

Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio, 63 Ohio St. 3d 555, 562-63, 589 N.E.2d 1292, 1298 (1992) (per curiam) (emphasis added) (quoting Hope Natural Gas Co., 320 U.S. at 603, 64 S. Ct. at 288).

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[3] Joint Motion, p. 4 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); Reply, p. 5 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); Joint Memorandum, p. 4 ("Ohio law provides that if another SSO is not approved prior to December 31, 2012, when DP&L's current ESP I was otherwise anticipated to terminate, DP&L's current SSO would simply continue").

The Commission has recently concluded in AEP's ESP proceeding that an ROE somewhere between 7%-11% was a "reasonable revenue target." Opinion and Order, p. 33 (Case No. 11-346).

Joint Movants proposed in their motion that the RSC should no longer be recovered, but changed their position in their reply memorandum, arguing that the RSC should become bypassable. Here, the attached Declaration of William Chambers shows that if the PUCO were to grant the relief now sought by the Joint Movants[4] -- i.e., extend DP&L's existing rates into 2013 but making the RSC bypassable -- then DP&L would earn an ROE of [redacted]% during any period in 2013 before the ESP II was approved. Chambers Dec., ¶ 4(b); Chambers Dec. Attachment WJC-I. That ROE is not reasonable, would not preserve DP&L's financial integrity, and indeed would constitute a taking. The Commission should therefore extend DP&L's existing rates (including the non-bypassable RSC) for a short time into 2013, until the Commission can issue an order deciding this case.

In their Reply, the Joint Movants make the following criticism of Dr. Chambers' analysis:

> "The ROE projections contained in the DP&L Memorandum also misstate the scope and significance of the relief requested by the Joint Motion because DP&L's ROE projections are based on the total company common equity balance (the denominator) and total company income (the numerator). Neither the numerator nor the denominator have been specified so as to focus only on the distribution-related investment reflected in the total company common equity balance nor the distribution-related income."

[4] The Joint Motion asked that the RSC be eliminated. Joint Motion, pp. 5, 12, 14. The Reply claimed (falsely) that the Joint Motion did not ask that the RSC be eliminated, but instead asked only that the RSC be made bypassable. Reply, pp. 5-6, 9-10, 13-15, 17, 21, 28. It is thus difficult to determine exactly what the Joint Movants want. Since the Reply was the later-filed document, DP&L assumes in the text that the Joint Movants ask that the RSC be made bypassable.

Reply, p. 17 (emphasis added).

That argument is simply absurd. The purpose of this case is to establish an SSO for DP&L; as the Commission knows, an SSO is a generation-related charge.[5] The Joint Movants' assertion that the Commission should consider only DP&L's distribution assets and distribution income when setting generation-rates is plainly frivolous. In fact, when the Commission established the Retail Stability Rider in AEP's case that was targeted to give AEP an opportunity to earn a 7% to 11% ROE, the Commission considered only generation-related charges.[6] The Commission should thus reject the argument that it should consider only distribution ROE when setting a generation rate.

Another argument of the Joint Movants in their Reply is:

> "DP&L has not offered any evidence demonstrating the nature and extent to which DP&L, the EDU, will be financially imperiled or its ability to render service will be impaired but for maintaining the RSC as a non-bypassable charge. Generalized and unsubstantiated claims of lower returns on common equity than the ROE that DP&L has previously enjoyed as a result of its SSO prices do not get the job done."

Reply, p. 21 (emphasis added).

The Commission should reject that argument for two separate reasons. First, it is simply false. Dr. Chambers' Declaration has detailed exhibits that explain how he calculated his projected ROE. Other than arguing that Dr. Chambers should consider only distribution ROEs (an argument that DP&L refuted above), the Joint Movants do not dispute his analysis. Further,

[5] The Supreme Court of Ohio has held that the RSC is a generation-related charge that must be included within DP&L's generation tariffs. Ohio Consumers' Counsel v. Pub. Utils. Comm'n, 114 Ohio St. 3d 340, ¶ 26 (2007).

[6] Opinion & Order, pp. 26-40. Specifically, in setting the level of AEP's RSR, the Commission considered retail non-fuel generation revenues, CRES capacity revenues, and credit for shop load. Id. at 35.

Dr. Chambers' Declaration expressly incorporates his prefiled testimony by reference (¶ 5); that testimony provides ample support for DP&L's taking argument. Second, the Joint Movants have not presented any evidence. DP&L's evidence is thus unrebutted.

The Joint Movants also assert (pp. 20-21) that the Commission cannot consider DP&L's financial integrity argument because DP&L has not filed an emergency rate case under Ohio Rev. Code § 4909.16. That is also absurd. The Supreme Court of Ohio has never so held. The Commission can and regularly does consider a utility's financial integrity without the filing of an emergency rate case; for example, the Commission considered AEP's financial integrity earlier this year in AEP's ESP case. There simply is no requirement that a utility make an Ohio Rev. Code § 4909.16 filing for the Commission to consider the utility's financial integrity. It should be and is the Commission's regular practice to consider a utility's financial integrity, regardless of whether a § 4909.16 case has been filed.

3. ESP I Stipulation: In addition, the argument of the Joint Movants that the ESP I Stipulation establishes that the RSC must be terminated after December 31, 2012 is based upon a flawed reading of the ESP I Stipulation. The ESP I Stipulation has two paragraphs that relate to that argument:

> "1. . . . the parties agree to extend DP&L's current rate plan through December 31, 2012 . . . .
>
> * * *
>
> 3. The current [RSC] charge will continue as a nonbypassable charge through December 31, 2012."

February 24, 2009 Stipulation and Recommendation, ¶¶ 1, 3 (Case No. 08-1094-EL-SSO).

The Joint Movants contend that "through December 31, 2012" (as used in ¶ 1) and "through December 31, 2012" (as used in ¶ 3) have different meanings. Specifically, ¶ 1 states that DP&L's current rates will extend "through December 31, 2012"; the Joint Movants assert that DP&L's current rates should continue in 2013.[7] Paragraph 3 states that DP&L's RSC will continue as a nonbypassable charge "through December 31, 2012"; but the Joint Movants assert that that phrase ("through December 31, 2012") means that DP&L agreed that the nonbypassable charge could not be extended beyond December 31, 2012.[8]

The Commission should reject the Joint Movants' argument because it is a basic tenet of interpretation that words used more than once in the same contract or provision have the same meaning throughout. State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 521, 644 N.E.2d 369 (1994) ("This court has consistently held that words used more than once in the same provision have the same meaning throughout the provision, unless there is clear evidence to the contrary."); Lakefront Airport Restaurant Corp. v. City of Cleveland, Cuyahoga App. No. 37049, 1978 Ohio App. LEXIS 10128, at *6 (Aug. 3, 1978) (finding that "the parties' use of the same term repeatedly within the same instrument lends itself to the inference that the same meaning was intended in each instance"). The Commission should thus conclude that "through December 31, 2012" has the same meaning in paragraph 1 and in paragraph 3 of the ESP I Stipulation.

Specifically, the Commission should conclude that the phrase "through December 31, 2012" establishes only that those rates are set through that date. That phrase does

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[7] Joint Motion, p. 4 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); Reply, p. 5 ("Ohio law specifies that ESP I shall continue until such time as the Commission lawfully approves a successor SSO"); Joint Memorandum, p. 4 ("Ohio law provides that if another SSO is not approved prior to December 31, 2012, when DP&L's current ESP I was otherwise anticipated to terminate, DP&L's current SSO would simply continue").

[8] Joint Motion, pp. 5, 12, 14; Reply, pp. 3, 5-6, 9-10.

not bar the Commission from continuing the existing rates; nor does the phrase mandate that existing rates continue.[9] The ESP I Stipulation is simply silent as to what rates will be after December 31, 2012. The Commission should thus reject the argument of the Joint Movants that the ESP I Stipulation mandates that the RSC expire after December 31, 2012.

The Reply (pp. 8-9) also argues that DP&L's interpretation of the ESP I Stipulation would deprive the first sentence of the ESP I Stipulation, ¶ 3 of any meaning, in violation of the tenet that all phrases should be construed so as to have their intended meaning. The Commission should reject that argument for three reasons. First, DP&L's interpretation of that sentence does not deprive it of meaning. Paragraph 1 of the ESP I Stipulation does not specifically mention the RSC; the inclusion of a reference to the RSC in the first sentence of ¶ 3 thus made it indisputably clear that the RSC was to remain in effect. Second, the remainder of ¶ 3 discusses the rates that shopping customers and government aggregators would pay to DP&L; since that is the topic of the paragraph, it provided additional clarity to discuss the RSC in that paragraph. Third, even if the Commission were to conclude that the first sentence of ¶ 3 was unnecessarily duplicative under DP&L's interpretation of the Stipulation, DP&L submits that it is better to interpret the Stipulation so that the same words have the same meaning (DP&L's interpretation) than to interpret the Stipulation so that the same words have different meanings (the Joint Movants' interpretation).

In the Reply, the Joint Movants also argue that the "history of the RSC" (p. 9) shows that the purpose of the ESP I Stipulation was "to promote effective competition and the

[9] As demonstrated above and as conceded by the Joint Movants, Ohio law does mandate that current rates, including the RSC, continue until a new SSO is approved by the Commission.

development of a competitive marketplace" (p. 10), and that "ending the non-bypassable status of the RSC as requested in the Joint Motion will further promote development of the competitive marketplace." (p. 12). The Commission should reject that argument for the following separate and independent reasons:

a) As demonstrated above, the ESP I Stipulation does not mean what the Joint Movants claim it does. It is well settled that bargaining history cannot be used to alter the plain meaning of a document.[10]

b) The Reply concedes that "the retail market for [CRES] providers has developed significantly in DP&L's distribution service area" (pp. 10-11) and that "there is an active and growing competitive retail market in DP&L's service territory." (p. 12). The Reply thus concedes that the goal of the ESP I Stipulation that the Reply identifies -- "to promote effective competition and the development of a competitive marketplace" (p. 10) -- has already been achieved. There is thus no need to eliminate the RSC to achieve that goal.

c) Finally, and most importantly, the Reply concedes repeatedly that the ESP I Stipulation was intended to be a "package." (pp. 9-10). The RSC was part of that "package." The Commission should not permit the Joint Movants to elect to take the benefits of a settlement package, but to rid

[10] The goal of construing contract language is to effectuate the parties' intent, which "is presumed to reside in the language they chose to employ in the agreement." Kelly v. Med. Life Ins. Co. (1987), 31 Ohio St.3d 130, 31 Ohio B. 289, 509 N.E.2d 411, paragraph one of the syllabus. Where (as here) the parties' agreement is unambiguous, courts give effect to the plain meaning of the parties' expressed intentions. Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St. 3d 51, 544 N.E.2d 920, syllabus. "Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence." Id. at 53 (citation omitted).

themselves of the corresponding obligations. The Commission should thus continue the entire package – not just part of it – until a new ESP is approved.

The Joint Reply asserts (p. 8) that "DP&L's ESP II Application and the DP&L Memorandum concede that Commission authorization is required to extend anything in ESP I beyond December 31, 2012." That is not true. DP&L agrees that the ESP I Stipulation says nothing about what DP&L's rates will be after December 31, 2012. However, as established above, Ohio law requires that DP&L's rates be extended until a new SSO is approved. (As also demonstrated above, the Joint Movants have repeatedly conceded that point.) Thus, whether the Commission acts or not, Ohio law requires that all of DP&L's rates be extended.

4. The Commission's FirstEnergy Decision is not on point: The Reply asserts (p. 6) that a Commission decision in a FirstEnergy ESP case somehow helps their argument. It does not. In that FirstEnergy case, the Commission had approved and modified a FirstEnergy ESP Application.[11] FirstEnergy withdrew its ESP Application, and therefore, its existing SSO rates were to continue pursuant to Ohio Rev. Code § 4928.143(C)(2)(b).[12] The issue in the case was which of FirstEnergy's rates would continue in effect and which would expire.[13] The Commission held that FirstEnergy's Rate Stabilization Charge ("RSC") would continue,[14] but that its Regulatory Transition Charge ("RTC") would expire.[15] The

[11] Finding & Order, ¶ 1 (Case No. 08-935-EL-SSO).

[12] Id. ¶ 9.

[13] Id.

[14] Id. ¶ 14.

Commission's decision in FirstEnergy that FirstEnergy's RTC should expire is inapplicable here for two separate and independent reasons.

First, the Commission's decision as to FirstEnergy's RTC was in error. As the Commission stated in that decision, FirstEnergy's then-existing SSO provided for the recovery of the RTC.[16] Ohio Rev. Code § 4928.143(C)(2)(6) states that if a utility withdraws its ESP after a Commission Order modifies that ESP, then "the Commission shall issue such order as is necessary to continue the provisions, terms and conditions of the utility's most recent standard service offer." The plain language of Ohio Rev. Code § 4928.143(C)(1)(b) thus establishes that FirstEnergy's RTC should have continued.

Second, in any event, the Commission's decision in the FirstEnergy matter is entirely inapplicable here. Specifically, as the Commission knows, regulatory transition costs were specific costs that a utility incurred in the past that would not be recoverable under deregulation. FirstEnergy's 2005 Stipulation provided that FirstEnergy would achieve a "full recovery" of its RTC "as of December 31, 2008."[17] The Commission thus held that FirstEnergy's RTC should terminate since FirstEnergy had already "fully recovered" that charge. The language and RTC in FirstEnergy's Stipulation is thus different from the terms of DP&L's ESP. These facts were particular to FirstEnergy's situation.

(...cont'd)

[15] Id. ¶ 17.

[16] Id. ¶ 16.

[17] Stipulation and Recommendation, ¶ 2 (Case No. 05-1125).

In fact, in the Commission's FirstEnergy Finding & Order, the Commission expressly stated that FirstEnergy's RSC would continue.[18] The Joint Movants' reliance on that decision is thus plainly misplaced.

5. Past Profits: The Reply also asserts (p. 13) that DP&L's past profits have been high. The Commission should disregard that comment because past profits cannot be considered by the Commission when it is setting future rates. For example, in City of Marietta v. Public Utils. Comm'n (1947), 148 Ohio St. 173, 184-85, 74 N.E.2d 74, the city argued that the Commission should have considered the utility's past earnings to set (and lower) the utility's future rates. The Supreme Court of Ohio held that doing so would violate the United States Constitution:

> "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. . . . Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations."

Id. (emphasis in original) (internal quotation marks and citations omitted). Accord: City of Cincinnati v. Public Utils. Comm'n of Ohio (1925), 113 Ohio St. 259, 281-82, 148 N.E. 817 ("The claim that past profits justify a present rate that is not reasonable is no more tenable than the converse contention that if a public service corporation has operated at a loss in prior years, it is therefore entitled to more than a reasonable present rate of return in order to make up for past deficits.") (internal quotation marks and citation omitted); Board of Pub. Utils. Comm'rs v. New York Tel. Co. (1926), 271 U.S. 23, 31-32, 46 S. Ct. 363, 70 L. Ed. 808 (under the Fourteenth

[18] Opinion and Order, ¶ 17.

Amendment to the United States Constitution, "[t]he revenue paid by the customers for service belongs to the company. . . . And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations.").

Here, as shown above, DP&L would earn an ROE of only [redacted]% if the RSC was made bypassable, as requested by the Joint Movants for the first time in their reply memorandum. Chambers Dec. 4(b); Chambers Dec. Attachment WJC-I. As demonstrated in the Chambers Declaration, that ROE is insufficient to allow DP&L to maintain its financial integrity and would constitute a taking. The Commission thus cannot consider any past profits when setting DP&L's future rates.

6. Discrimination: The Reply also asserts (p. 14) that there is "discrimination" because government aggregation customers can avoid the RSC but other customers cannot. As the Commission knows, Ohio Rev. Code § 4928.20(J) specifically provides that government aggregators can avoid the RSC, thus it is mandated by law—not something unique to DP&L.

7. AES's Financial Integrity Statements: The Reply (pp. 15-16) makes much of the fact that AES stated publicly that one of the goals of the ESP II Application is to maintain DP&L's "financial integrity." The Reply seems to suggest that there is something improper about trying to maintain DP&L's financial integrity. Plainly, that is not so.

8. A Hearing Is Required: The Supreme Court of Ohio has held that the Commission must conduct a hearing before it can lower a utility's rates. Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio, 64 Ohio St. 3d 145, 147, 593 N.E.2d 286, 287 (1992) ("The commission conceded at oral argument that the order of May 8, 1991 effected a utility rate

change. As a prerequisite to such action, the commission was obliged to give notice and conduct a hearing in accordance with R.C. 4905.26."); MCI Telecomms. Corp. v. Pub. Utils. Comm'n of Ohio, 38 Ohio St. 3d 266, 269, 527 N.E.2d 777, 780 (1988) ("The language of [Ohio Rev. Code § 4905.26] obviously requires the PUCO to give notice and conduct a hearing before ordering a change in utility rates.").

The Commission can continue DP&L rates for a short period of time into 2013 without conducting a hearing. However, the Commission must conduct a hearing before it can lower DP&L's rates (i.e., eliminate the RSC). At such a hearing, DP&L would present evidence regarding (among other points) the damage that eliminating the RSC would do to DP&L's financial integrity.

IV. CONCLUSION

The Commission should issue an Order that DP&L's current rates will continue during 2013 until the Commission has issued an Order in this case and DP&L has had time to implement that Order.

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