

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
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**THE DAYTON POWER AND LIGHT COMPANY'S  
MEMORANDUM IN OPPOSITION TO THE JOINT MOTION FOR STAY TO  
PREVENT DP&L FROM CHARGING CUSTOMERS THE SERVICE STABILITY  
RIDER WHILE APPEALS ARE PENDING OR, IN THE ALTERNATIVE, MOTION TO  
MAKE DP&L'S RATES FOR CHARGING THE SERVICE STABILITY RIDER COSTS  
TO CUSTOMERS SUBJECT TO REFUND PENDING THE OUTCOME OF  
REHEARING AND ANY APPEALS BY INDUSTRIAL ENERGY USERS-OHIO,  
OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENERGY GROUP AND  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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## I. INTRODUCTION AND SUMMARY

The Public Utilities Commission of Ohio ("Commission") should reject the latest attempt by Industrial Energy Users-Ohio ("IEU"), The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Energy Group ("OEG"), and Ohio Partners for Affordable Energy ("OPAE") (collectively the "Joint Movants") to prevent The Dayton Power and Light Company ("DP&L") from collecting the Service Stability Rider ("SSR"). The Commission authorized the SSR to ensure DP&L's financial integrity and thereby promote stable, reliable, and safe retail electric service. Sept. 4, 2013 Opinion and Order, pp. 21-22. The Commission has upheld the legality and the propriety of the SSR throughout the rehearing process. Mar. 19, 2013 Second Entry on Rehearing; June 4, 2014 Fourth Entry on Rehearing. Joint Movants, nevertheless, ask the Commission to either (1) stay its authorization of the SSR pending an appeal to the Supreme Court of Ohio, or (2) require DP&L to forgo the immediate benefits of the SSR by collecting the charge subject to refund. The Commission should deny the Joint Motion for four reasons.

First, earlier this year, the Commission rejected a remarkably similar motion by OCC, OPAE, Kroger Company ("Kroger"), and Ohio Manufacturers' Association ("OMA"). In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates, et al., Case Nos. 12-1685-GA-AIR, et al. ("Duke Gas Case"), Entry, p. 6 (Dec. 2, 2013). As in this case, those movants urged the Commission to either (1) stay an order allowing Duke Energy Ohio, Inc. ("Duke Energy") to recover certain environmental investigation and remediation costs, or (2) require Duke Energy to recover those costs subject to refund. Id. at 2. The Commission found the requested relief "antithetical" to its decision authorizing Duke Energy to recover those costs and, therefore, denied the motion. Id. at 6.

Second, the Supreme Court of Ohio has held that the Commission has no authority to stay its final orders. Office of Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 403, 575 N.E.2d 157 (1991). Instead, Ohio Rev. Code § 4903.16 provides the exclusive mechanism for granting such stays. Id. Under that statute, only the Supreme Court may issue a stay upon an "undertaking, payable to the state . . . conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of . . . in the event such order is sustained." Ohio Rev. Code § 4903.16. The Commission should not allow Joint Movants to avoid those requirements. Indeed, if the Commission were to grant a stay, it would violate Section 4903.16, as well as Ohio Rev. Code § 4903.15, which provides that "[u]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission."

Third, even if the Commission were to find that it has the authority to stay its final orders, Joint Movants have not demonstrated the necessity of the requested stay. First, they have not shown a strong likelihood of success on the merits. Indeed, they completely ignore the statute under which the Commission authorized the SSR – Ohio Rev. Code § 4928.143(B)(2)(d) – and fail to challenge the Commission's factual findings that the elements of that statute were satisfied. In addition, given DP&L's current need for the SSR to maintain its financial integrity and to provide stable, reliable, and safe electric service for its customers, Joint Movants cannot show that the collection of the SSR would irreparably harm customers or be contrary to the public interest. On the contrary, the proposed stay would cause substantial harm not only to DP&L, but also to its customers because the evidence at the hearing in this proceeding demonstrated that DP&L could not provide stable, reliable, and safe service without the charge.

Finally, it is well settled that rates are not subject to refund in Ohio. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus. The Commission should, therefore, deny the request of Joint Movants to allow DP&L to recover the SSR, subject to refund.

## **II. BACKGROUND**

As described at length during the hearing in this case, DP&L has faced serious threats to its financial integrity and consequently, to its ability to provide safe and reliable service. DP&L Ex. 1A, CLJ-1 (Jackson); Tr. 2822-23 (Malinak). As the Commission found, DP&L's declining return on equity (and the corresponding threats to DP&L's financial integrity and ability to provide safe and reliable service) was being driven principally by three factors: (1) increased switching; (2) declining wholesale prices; and (3) declining capacity prices. DP&L Ex. 1A, p. 13 & CLJ-1 (Jackson); Tr. 135-36 (Jackson).

Responding to those concerns, the Commission authorized DP&L to collect the SSR beginning January 1, 2014. September 4, 2013 Opinion and Order, p. 25. The Commission found that the SSR was authorized by Ohio Rev. Code § 4928.143(B)(2)(d), and that "the SSR would have the effect of stabilizing or providing certainty regarding retail electric service." Id. at 21. The Commission further agreed with DP&L that "if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service." Id. The Commission explained that "DP&L continues to be responsible for offering SSO service to its customers and has demonstrated that the SSR is the minimum amount necessary to maintain its financial integrity to provide such service." Id. The Commission also recognized that it had previously found that a similar charge – AEP's RSR – was lawful. Id. (citing In the Matter of the

Application of Columbus S. Power Co. and Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, et al., Case Nos. 11-346-EL-SSO, et al., Opinion and Order, p. 32 (Aug. 8, 2012)). Despite repeated attacks, the SSR has withstood five entries on rehearing.

### III. ARGUMENT

#### A. The Commission Rejected a Similar Request Earlier This Year

Joint Movants have recycled an unsuccessful motion from the recent Duke Gas Case, raising the same arguments that the Commission rejected in February 2014. Duke Gas Case, Entry, p. 1 (Feb. 19, 2014). Indeed, the motions are so similar that Joint Movants refer to Duke's tariff filings on the first page of their Memorandum – they apparently copied their arguments from that motion, but neglected to correct footnote 1. Joint Motion, p. 1 n.1 (citing Duke's Compliance Tariff Filing at Exhibit 1 (Nov. 27, 2013)).

In the Duke Gas Case, the issue before the Commission was whether Duke Energy could recover costs for the investigation and remediation of its manufactured gas plants ("MGPs"). Duke Gas Case, Entry, p. 1 (Feb. 19, 2014). The Commission found that Duke Energy could recover those costs through a Rider MGP, and pursuant to the Commission's order, Duke Energy filed proposed tariffs for review and approval. Id. at 1-2. Shortly thereafter, OCC, OP&E, Kroger, and OMA asked the Commission to stay Rider MGP or, in the alternative, to order Duke Energy to collect Rider MGP subject to refund. Id. at 2. The movants argued that the Commission had failed to apply Ohio's ratemaking laws properly, that customers would be irreparably harmed by the collection of Rider MGP, and that Duke Energy could avoid any harm from not collecting Rider MGP by accruing carrying charges during a stay. Id. at 3-4.

The Commission rejected those arguments, stating:

"In our Order and Entry on Rehearing, the Commission thoroughly reviewed and considered all arguments raised by the parties in these cases in rendering our decision on the merits of Duke's request to recover the MGP-related costs. Our ultimate analysis and application of the statute and precedent was clearly delineated in those documents. Therefore, we believe it would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay at this time. Moreover, when applying the four-factor test advocated by Movants to determine whether a stay should be granted in these proceedings, we conclude that Movants have failed to satisfy the criteria, as they have failed to demonstrate a strong showing that they are likely to prevail on the merits, that they would suffer irreparable harm absent the stay, that the stay would cause substantial harm to other parties, or that the public interest requires the stay. As for Movants' alternative proposal that the Rider MGP would be subject to refund, the Commission, likewise, finds that such a determination would be contrary to our decision in these cases approving Duke's request to recover the MGP-related costs.

Id. at 5-6 (emphasis added). This action is identical in every relevant respect, and the Commission should reach the same result here.

**B. The Commission Has No Authority To Stay Its Own Final Orders**

The Supreme Court of Ohio has ruled that Ohio Rev. Code § 4903.16 provides the exclusive mechanism for staying a final order of the Commission. Joint Movants should not be permitted to avoid that statute's requirements.

Indeed, this issue was settled in Office of Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 575 N.E.2d 157 (1991). In that case, OCC asked the Commission to stay an order directing the collection of new rates and then appealed from the Commission's denial of that requested stay. Id. at 403. The Court affirmed the Commission's denial of the stay, explaining:

"OCC sought to stay the implementation of the amendment of the rates resulting from the Commission's prior order to delete the condominium clause from Ohio Edison's tariff. However, it did not follow the statutory procedure of asking the Supreme Court to stay an order of the Commission, including posting a bond. See R.C. 4903.16. Instead, OCC moved the Commission itself to stay consideration of the amendment application. The Commission denied that motion, and OCC appealed to this court . . . .

That was a *final* Commission order. If appellant wished to stay the collection of rates authorized by that order pending its appeal thereof, it should have moved to stay the order. Additionally, in that R.C. 4903.16 is the statute dealing with staying a final Commission order, appellant should have complied with all of its requirements. Appellant did not apply to this court for a stay of the final order . . . nor did it post a bond. Therefore, based upon R.C. 4903.16, and this court's interpretation thereof, appellant would not be entitled to the relief it seeks . . . ."

Id. (emphasis in original). Accord: Columbus v. Pub. Util. Comm., 170 Ohio St. 105, 109, 163 N.E.2d 167 (1959) ("[A]ny stay of an order of the commission is dependent on the execution of an undertaking by the appellant.").

If the Commission were to issue a stay at this point, it would be inconsistent with the requirements established by the General Assembly that stays of final orders of the Commission be (1) issued by the Supreme Court of Ohio, and (2) subject to an undertaking by the appellant. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." In re Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. Indeed, the General Assembly has "has seen fit to establish a significant requirement to the court's stay power: the posting of a bond sufficient to protect the utility against damage." Id. at ¶ 20. The Commission should not accept Joint Movants' invitation to upend that statutory framework. Moreover, doing so would also be contrary to Ohio Rev. Code § 4903.15, which provides that "[u]nless a different time is specified



therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission."

**C. Even if the Commission Had Authority to Grant the Requested Relief, Joint Movants Have Not Demonstrated that a Stay is Proper**

Joint Movants ask the Commission to apply a four-factor test articulated by Justice Douglas in his dissent in MCI Telecommunications Corp. v. Pub. Util. Comm., 31 Ohio St.3d 604, 510 N.E.2d 806 (1987). Even if the Commission were to apply that test, Joint Movants do not satisfy its high standards. Specifically,

"[w]hen the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration -- if at all, and then only where certain standards are met. These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, where lies the interest of the public."

Id. at 606 (Douglas, J., dissenting) (emphasis added).

Joint Movants have not demonstrated that those standards call for a stay in this proceeding. First, in considering their likelihood of success on the merits, Joint Movants ask the Commission yet again to consider the legality and propriety of the SSR. However, they have already raised the arguments against the SSR that appear in their Joint Motion (p. 4) earlier in this proceeding, namely that the SSR is an impermissible transition charge and that the SSR is an anti-competitive subsidy. Sept. 4, 2013 Opinion and Order, p. 19 ("FES, IEU-Ohio, OCC, FEA, Kroger, OEG, OHA, and Wal-Mart claim that the SSR is a generation-related charge, the granting of which would be anticompetitive" and "IEU-Ohio, IGS, Kroger, and OCC contend

that the SSR is an unlawful and unreasonable transition charge"). The Commission considered and rejected those arguments in the September 4, 2013 Opinion and Order.

Significantly, Joint Movants completely ignore the statute on which the Commission authorized the SSR: Ohio Rev. Code § 4928.143(B)(2)(d). They do not cite the statute; they do not quote the statute; and they do not argue that the Commission erred when it found as a factual matter that the SSR satisfied the elements of that section. Sept. 4, 2013 Opinion and Order, pp. 21-22. Their failure to address that section dooms their arguments because they cannot show a probability of success without addressing that section.

Second, given DP&L's immediate need for the SSR to maintain its financial integrity and, thereby, provide stable, reliable, and safe electric service, Joint Movants cannot show that the collection of the SSR would irreparably harm customers or be contrary to the public interest. On the contrary, the proposed stay would cause substantial harm to DP&L and DP&L's customers.

Specifically, as Mr. Jackson testified:

"Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.

A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, it is the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity." DP&L Ex. 16A, p. 8 (Jackson Rebuttal) (emphasis added).

Ms. Seger-Lawson also testified as follows:

- "Q. Is the SSR a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?
- A. Yes it is. It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity, which is important to the company's ability to provide stable, safe, and reliable electric service. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity, and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service." DP&L Ex. 12, p. 23 (Seger-Lawson Rebuttal) (emphasis added).

Dr. Chambers explained further:

- "Q. Will the SSR have the effect of stabilizing and providing certainty regarding retail electric service?
- A. Yes. The SSR will provide DP&L with a relatively stable element in its revenue mix. As discussed above, it is an important factor in maintaining the Company's financial integrity and thus permits it to provide quality service to its customers. Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers." DP&L Ex. 4A, p. 53 (emphasis added).

Joint Movants do not refute that testimony. Instead, they rely on two cases outside the realm of public utilities to show that their inability to seek a refund under Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957) would cause irreparable harm: Tilberry v. Body, 24 Ohio St.3d 117, 493 N.E.2d 954 (1986) and Sinnott v. Aqua-Chem., Inc., 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217. In each case, the Court did not issue a stay, but rather found that an interlocutory order was immediately appealable. In Tilberry, the Court found that an order dissolving a partnership was appealable before "the winding-up, accounting and distribution of assets," because otherwise, a reversal

would have been "chaotic at best, and virtually impossible to accomplish." Tilberry at 121. In Sinnott, the Court ruled that orders allowing asbestos claims to proceed to trial upon the prima facie showing required by Ohio Rev. Code § 2307.92 are immediately appealable. Id. at ¶ 4. The Court recognized that "the General Assembly has distinguished asbestos litigation from other types of litigation" in order to "preserve the resources of asbestos defendants so that more injured plaintiffs can be made whole." Id. at ¶ 25. The Court, therefore, departed from the "general rule [that] 'contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense are without merit.'" Id. (quoting State ex rel. Lyons v. Zaleski, 75 Ohio St.3d 623, 626, 665 N.E.2d 212 (1996)). Both Tilberry and Sinnott are thus far too remote to be relevant to this proceeding.

Instead, the critical issue for the Commission is whether DP&L can maintain financial integrity and provide stable, reliable, and safe electric service without the SSR. The Commission has repeatedly found that DP&L cannot do so; therefore, staying the SSR would jeopardize stable, reliable, and safe electric service in DP&L's service territory. Sept. 4, 2013 Opinion and Order, pp. 21-22 ("Finally, the Commission believes the SSR would have the effect of stabilizing or providing certainty regarding retail electric service."); Mar. 19, 2013 Second Entry on Rehearing, p. 9 ("As the Commission has previously noted, the SSR and SSR-E are financial integrity charges intended to maintain the financial integrity of the entire company, not just the generation business."). Consequently, Joint Movants have not shown that their requested relief is proper.

Joint Movants (p. 6) also argue that any harm to DP&L from a stay could be eliminated by allowing DP&L to accrue carrying charges on the SSR amount during the stay. But that is not so. As demonstrated above, DP&L needs the SSR to maintain its financial

integrity and to provide stable, reliable, and safe service. DP&L and its customers would be harmed by a stay of the SSR, as the stay would eliminate DP&L's ability to provide such service. The accrual of carrying charges during the pendency of a lengthy stay simply would not solve that problem.

**D.     The Request for an Order Requiring DP&L to Collect the SSR Subject to Refund is Not Proper**

As an alternative to the stay, Joint Movants (pp. 7-8) ask the Commission to order DP&L to collect the SSR subject to refund. That proposal, however, is not consistent with longstanding precedent of the Supreme Court of Ohio. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tell. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action in restitution of the increase in charges collected during the pendency of the appeal.").

The Supreme Court of Ohio recently rejected a similar argument when reviewing AEP's 2008 ESP case. In re Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In that case, OCC argued that the Commission should have made AEP's ESP rates subject to refund. Id. at ¶ 16. The Court rejected that argument, explaining that "under Keco, we have consistently held that the law does not allow refunds in appeals from commission orders." Id. (emphasis added). Accord: Ohio Consumers' Counsel v. Pub. Util. Comm., 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21 (stating that "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking"); Green Cove Resort I Owners'

Assn. v. Pub. Util. Comm., 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27

("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in Keco . . ."). The Commission cannot deviate from that established caselaw in this proceeding.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should deny the Joint Motion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to the Joint Motion for Stay to Prevent DP&L from Charging Customers the Service Stability Rider While Appeals Are Pending or, in the Alternative, Motion to Make DP&L's Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund Pending the Outcome of Rehearing and Any Appeals by Industrial Energy Users-Ohio, Office of the Ohio Consumers' Counsel, Ohio Energy Group and Ohio Partners for Affordable Energy has been served via electronic mail upon the following counsel of record, this 14th day of August, 2014:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to the Joint Motion for Stay to Prevent DP&L from Charging Customers the Service Stability Rider While Appeals Are Pending or, in the Alternative, Motion to Make DP&L's Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund Pending the Outcome of Rehearing and Any Appeals by Industrial Energy Users-Ohio, Office of the Ohio Consumers' Counsel, Ohio Energy Group and Ohio Partners for Affordable Energy electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company