

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The) Dayton Power and Light Company for) Approval of its Market Rate Offer.)	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

ENTRY

The Commission finds:

- (1) Dayton Power & Light Company (DP&L) is a public utility within the definition of R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.
- (2) On September 4, 2013, the Commission issued its Opinion and Order (ESP Order) in this case, approving DP&L's proposed electric security plan with certain modifications. In the ESP Order, the Commission authorized DP&L to collect \$330 million from customers through the proposed Service Stability Rider (SSR), pursuant to R.C. 4928.143(B)(2)(d). The Commission agreed that the SSR was a nonbypassable stability charge and approved DP&L to collect the SSR beginning January 1, 2014. The Commission directed DP&L to file proposed tariffs reflecting the authorized amount to be included in the SSR for review and approval. Entries on

Rehearing were issued October 23, 2013, March 19, 2014, June 4, 2014, and July 23, 2014, and the Commission subsequently denied each rehearing on the assignments of error regarding the SSR, except to clarify its calculation and the proper implementation procedure.

- (3) On November 15, 2013, DP&L filed its proposed tariffs for review and approval. The Commission approved the proposed tariffs in an Entry issued December 18, 2013. DP&L filed its newly revised tariffs on December 30, 2013, pursuant to the December 18 Entry, to take effect beginning January 1, 2014.
- (4) On July 30, 2014, Industrial Energy Users-Ohio (IEU-Ohio), the Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), and Ohio Partners for Affordable Energy (OPAE) (collectively, Joint Movants) filed a motion requesting the Commission to stay the Commission's ESP Order to prevent DP&L from collecting from its customers through the SSR. Joint Movants assert that the Commission's ruling violates R.C. 4928.38, 4928.03, and 4928.02(H). Joint Movants further contend that if the additional amount is permitted to be collected from customers before the Supreme Court has the opportunity to rule on this matter, the customers will suffer irreparable harm as a result. According to Joint Movants, a stay is necessary in order to prevent irreparable harm to DP&L's customers during the pendency of the appeal of the ESP Order. In the alternative, Joint Movants request the Commission order that the rates paid by customers for DP&L's SSR-related charges be collected subject to refund to customers. *In re Columbus & S. Ohio Elec. Co.*, Case No. 81-1058-EL-AIR, Entry (Nov. 17, 1982) and Order on Rehearing (May 1, 1984).
- (5) On August 29, 2014, IEU-Ohio filed a notice of appeal in this proceeding.
- (6) While Joint Movants acknowledge there is no controlling precedent setting forth the conditions under which the Commission will stay an order, they state the Commission has favored the following four-factor test governing a stay that has been used in courts when determining whether to stay an administrative order pending judicial review: whether there has been a strong showing that movant is likely to prevail on

the merits; whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; whether the stay would cause substantial harm to other parties; and the public interest. *In re the Comm.'s Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (Feb. 20, 2003); *In re Northeast Ohio Pub. Energy Council*, Case No. 09-423-EL-CSS, Entry (July 8, 2009).

Joint Movants assert they have met this four factor test. Joint Movants contend if the Commission had properly applied Ohio law, specifically R.C. 4928.38, 4928.03, and 4928.02(H), DP&L's request for recovery of the stability charges should have been denied. Joint Movants argue allowing for this type of recovery is "contrary to the entire premise of S.B. 221." Additionally, Joint Movants assert that the SSR is an impermissible transition charge, pursuant to R.C. 4928.38, as it permits DP&L to receive transition revenues after its market development period has already ended. Further, Joint Movants argue that allowing DP&L to collect revenues from distribution customers to support generation service violates R.C. 4928.02(H), which prohibits anti-competitive subsidies between competitive and non-competitive retail services. Therefore, Joint Movants opine that there is a strong likelihood that they will prevail on the merits. Joint Movants further offer that the Supreme Court traditionally looks to whether there is an effective legal remedy if the order takes effect to determine whether to stay the proceeding, noting that economic harm does become irreparable where the loss cannot be recovered. *Tilberry v. Body*, 24 Ohio St.3d 117, 493 N.E.2d 954 (1986); *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 876 N.E.2d 1217 (2007). Joint Movants believe the customers are unlikely to recover their losses in the event the Supreme Court overturns the Commission's decision. Joint Movants note that DP&L is likely to assert that there is no mechanism under Ohio law that permits the retroactive refund of over-collections from customers, where such payments are not made subject to refund. *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997); *Keco Industries v. The Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). The Commission, while granting the request for the recovery of stability charges, denied DP&L's request for associated

carrying costs. Therefore, in order to protect DP&L from harm arising from a stay and, thus, the delay in collection of the SSR amount from customers, Joint Movants suggest the Commission authorize DP&L to accrue reasonable carrying charges during the pendency of the stay. Finally, Joint Movants assert that, given these difficult economic times, customers cannot afford unjustified increases in essential services, and therefore, the public interest would be furthered by a stay of the collection of the SSR amount.

- (7) On August 14, 2014, DP&L filed a memorandum contra to the Joint Movants' motion to stay, stating that the motion is an effort to reassert arguments already heard and decided by the Commission. DP&L submits that the motion is procedurally and legally defective. DP&L first notes that Joint Movants' motion is "remarkably similar" to another motion that was rejected by the Commission earlier this year. *In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, et al., Entry (Dec. 2, 2013) (Duke Gas Case). Secondly, DP&L notes that, in accordance with R.C. 4903.15, a Commission order is effective immediately, unless a different time is specified by the Commission. Moreover, DP&L states the Supreme Court has affirmed that the collection of rates pursuant to a Commission order will not be stayed absent an application to the Court and the posting of a bond. *Keco* at 258; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991); *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655 (2011). In addition, DP&L points to Commission precedent wherein the Commission denied a motion to stay, noting that the legality of the decision was a question to be decided by the Supreme Court. However, DP&L states Joint Movants ignore this established protocol and improperly seek to stay the Commission's Order. With regard to Joint Movants' alternative proposal that the Commission should have made the SSR subject to refund, DP&L argues that any refund order would be contrary to Supreme Court precedent declining to engage in retroactive ratemaking. DP&L notes that the Supreme Court has made it clear that the statutes protect against unlawfully high rates by allowing the Court to stay execution of Commission orders, in accordance with R.C. 4903.16.

- (8) Moreover, DP&L submits that the four-factor test referenced by Joint Movants cannot be sustained. According to DP&L, the Commission's ESP Order is well-founded and the SSR is properly authorized by R.C. 4928.143(B)(2)(d), therefore, Joint Movants cannot establish a likelihood of prevailing on the merits. DP&L avers that Joint Movants cannot establish and support the existence of irreparable harm to customers or other parties, stating that the Supreme Court cases cited by Joint Movants, *Tilberry* and *Sinnott*, in support of their claim are either remote from the matters under consideration in these proceedings or unrelated to Joint Movants' present arguments. To the contrary, DP&L argues that the proposed stay would cause substantial harm to DP&L and its customers by preventing DP&L from providing reliable and stable service. As to the public interest, DP&L states that, for the Commission to stay its own decision would create doubt on those who maintain interest in the financial status of DP&L and its regulatory oversight. Such uncertainty would have negative financial consequences on DP&L and for its customers. Therefore, a stay is not in the best interest of the public.
- (9) Joint Movants filed a reply to DP&L's memorandum contra on August 21, 2014, arguing that, contrary to DP&L's assertions, the Commission has the authority to grant a stay to protect DP&L's customers during the process of rehearing and any appeals. Additionally, Joint Movants state that DP&L's reliance on the outcome of the *Duke Gas Case* is unwarranted since the Supreme Court subsequently ordered the collection of Rider MGP be stayed, initially without ordering the posting of a bond. Joint Movants request the Commission to follow the precedent set forth in that case. Joint Movants also assert that, in accordance with R.C. 4903.10, the Commission may effect a stay of its ESP Order, as long as that action is taken before an appeal occurs and jurisdiction is relinquished to the Supreme Court. Joint Movants note, however, that the Commission, in the past, has granted stays pending the results of an appeal. *In re The Ohio Power Co.*, Case No. 77-380-EL-FAC, Entry (Aug. 30, 1978). Joint Movants argue the Commission should take similar action in these cases pending judicial review.

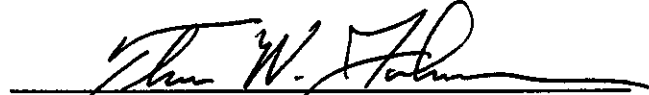
- (10) The Commission has established that we will not issue a stay in a proceeding once an appeal has been filed. *In re The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Entry (July 29, 2009); see also, *In re Columbus and Southern Ohio Elec. Co.*, Case No. 78-1438-EL-AIR, Entry (March 19, 1980) (citing *State, ex rel. Special Prosecutors v. Judges*, 55 Ohio St.2d 94 (1978)). Therefore, in light of the fact that IEU-Ohio has appealed the Commission's decision in these cases to the Supreme Court of Ohio, the Commission will not grant a stay of the implementation of the SSR, as requested by Joint Movants. This case differs from the case cited by Joint Movants, where the parties sought a stay prior to the Commission's ruling on rehearing, let alone prior to the filing of an appeal. Thus, at this time, the proper avenue for consideration of such a request would be before the Supreme Court itself. Nonetheless, even if the Commission were to consider issuing a stay, the Commission is not persuaded that the extraordinary remedy of a stay is justified under the circumstances of these proceedings, and cannot find that Joint Movants have demonstrated that the four-factor test governing a stay request has been met. Joint Movants have raised no issue in their motion that the Commission has not previously considered. The Commission finds no legal support for Joint Movants' claim that there is a reasonable possibility that the Supreme Court of Ohio will reverse or remand the ESP Order. The Commission, therefore, finds that Joint Movants have not demonstrated that they are likely to prevail on the merits. Additionally, Joint Movants have not convinced the Commission that they would suffer irreparable harm absent the stay, that DP&L would not be substantially harmed as a result of the stay, or that a stay is in the public interest. Accordingly, the Commission finds that the Joint Movants' motion requesting that the Commission stay implementation of the SSR should be denied.

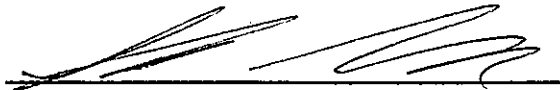
It is, therefore,

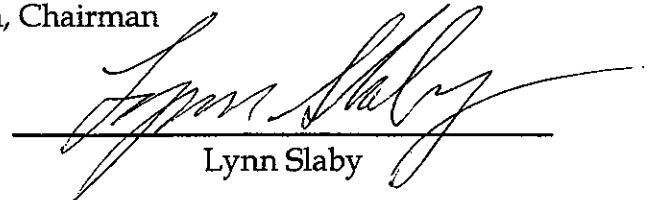
ORDERED, That the motion requesting the Commission stay implementation of the SSR, filed by Joint Movants on July 30, 2014, be denied. It is, further,

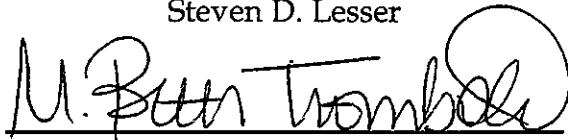
ORDERED, That a copy of this entry be served on all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Thomas W. Johnson, Chairman


Steven D. Lesser



Lynn Slaby


M. Beth Trombold


Asim Z. Haque

GAP/MJA/sc

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Barcy F. McNeal
Secretary