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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO THE JOINT MOTION OF INDUSTRIAL ENERGY USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL FOR AN ORDER REQUIRING THAT THE SERVICE STABILITY RIDER BE COLLECTED SUBJECT TO REFUND

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I. INTRODUCTION AND SUMMARY

Despite a pending appeal from this proceeding,[1] Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (together, "Joint Movants") ask the Commission to modify its authorization of the Service Stability Rider ("SSR") and require The Dayton Power and Light Company ("DP&L") to collect the SSR subject to refund. The Joint Motion should be denied for three separate and independent reasons.

First, the Commission lacks jurisdiction to modify the SSR, which currently is under review by the Supreme Court of Ohio. The Supreme Court has exclusive jurisdiction to "reverse[], vacate[], or modif[y]" final orders of the Commission,[2] and the Court repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). There is no statute or rule allowing the Commission to modify its orders while they are on appeal; therefore, the Commission lacks jurisdiction to grant the relief requested by Joint Movants.

Second, the Joint Motion is substantively flawed. Contrary to the assertion of Joint Movants (p. 5), the arguments supporting the SSR are not "nearly identical" to the

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[1] Supreme Court of Ohio Case No. 2014-1505 (filed Aug. 29, 2014; oral argument scheduled for June 14, 2016).

[2] R.C. 4903.13.

arguments made to support AEP-Ohio's Retail Stability Rider ("RSR"), which the Supreme Court recently ruled was in violation of R.C. 4928.38. In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 25 (Sup. Ct. Ohio Apr. 21, 2016) ("AEP Case"). Indeed, Joint Movants ignore two arguments raised by the Commission and DP&L in DP&L's pending appeal before the Supreme Court of Ohio. Those arguments show that § 4928.38 does not apply to charges authorized pursuant to § 4928.143(B)(2)(d) – like the SSR: (1) the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of § 4928.38, and (2) as the later-enacted statute, § 4928.143(B)(2)(d) cannot be not limited by § 4928.38.[3] These significant statutory issues were neither raised by the parties nor considered by the Court's majority in the AEP Case.

Third, requiring DP&L to collect the SSR subject to refund would be contrary to long-established Ohio law and Commission precedent. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957) ("Under [§ 4905.32] a utility . . . is clearly forbidden to refund any part of the rates collected."); In the Matter of the Application of The Dayton Power and Light Co. for Approval of Tariff Changes Associated with the Request to Implement a Billing Cost Recovery Rider, Case No. 05-792-EL-ATA (Mar. 1, 2006 Opinion and Order), p. 14 (rejecting motion to collect rider subject to refund as contrary to Commission precedent).

[3] The Commission and DP&L made these arguments to the Supreme Court in their Supplemental Brief of Appellee the Public Utilities Commission of Ohio and Cross-Appellant The Dayton Power and Light Company Regarding Recent Supreme Court Decision (appended to the May 13, 2016 Motion of Appellee the Public Utilities Commission of Ohio and Appellee/Cross-Appellant The Dayton Power and Light Company for Leave to File Supplemental Brief Regarding Recent Supreme Court Decision).

II. THE COMMISSION LACKS JURISDICTION TO MODIFY THE SSR BECAUSE THE COMMISSION'S ORDER IS ON APPEAL TO THE SUPREME COURT OF OHIO. THE COMMISSION LOST JURISDICTION WHEN THE APPEAL WAS TAKEN

The Commission cannot order DP&L to collect the SSR subject to refund because the Commission has no jurisdiction to modify the SSR. The Supreme Court of Ohio repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). Accord: Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div., 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph three of the syllabus; State ex rel. Gatlin v. Yellow Freight Sys., Inc., 18 Ohio St.3d 246, 249, 480 N.E.2d 487 (1985); Todd v. Gen. Motors Corp., 65 Ohio St.2d 18, 19, 417 N.E.2d 1017 (1981). That holding is consistent with the Ohio rule that "[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." Howard v. Catholic Social Servs., 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994) (per curiam) (emphasis added).

In Title 49, the General Assembly has adopted a comprehensive framework for reviewing final orders of the Commission, which includes applications for rehearing and direct appeals to the Supreme Court. R.C. 4903.10 through 4903.13. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. Accord: Penn Cent. Transp. Co. v. Pub. Util. Comm., 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), paragraph one of the syllabus (holding that the Commission "is a

creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute"); Ohio Bus Line, Inc. v. Pub. Util. Comm., 29 Ohio St.2d 222, 226, 280 N.E.2d 907 (1972) (holding that the Commission "has only such jurisdiction and authority to act as is vested in it by statute"). No statute in that framework allows the Commission to reconsider its final orders once they are under review by the Supreme Court. Such reconsideration would be directly inconsistent with the Court's jurisdiction to "reverse[], vacate[], or modif[y]" the Commission's orders. R.C. 4903.13. Accord: Howard at 146.

Since the General Assembly has not authorized the Commission to reconsider its orders while appeals from such orders are pending, the Commission lacks jurisdiction to modify the SSR while that charge is under review by the Supreme Court. The Commission should deny the Joint Motion this reason alone.

III. THE SSR IS SUPPORTED BY ARGUMENTS THAT WERE NEITHER RAISED BY THE PARTIES NOR ADDRESSED BY THE MAJORITY IN THE SUPREME COURT OF OHIO'S RECENT AEP CASE

A. BACKGROUND: RECENT RULING IN THE AEP CASE

The Ohio General Assembly deregulated the generation market in 1999, but partially re-regulated the market in 2008. Specifically, in 1999, the General Assembly required electric distribution utilities to charge their customers a "market based" rate[4] and permitted limited recovery of transition costs.[5]

In 2008, Am.Sub.S.B. 221 repealed the section requiring utilities to charge a market based rate, and instead required utilities to charge rates set through a Market Rate Offer

[4] Ohio Consumers' Counsel v. Pub. Util. Comm., 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 15, quoting prior version of R.C. 4928.14(A).

[5] R.C. 4928.37 through 4928.40.

or an Electric Security Plan ("ESP"). R.C. 4928.141, 4928.142, 4928.143. Critically, as part of an ESP, a utility was authorized to recover a charge that would allow the utility to provide stable and certain "retail electric service." R.C. 4928.143(B)(2)(d). The term "retail electric service" is defined to include generation service. R.C. 4928.01(A)(27). Section 4928.143(B)(2)(d) thus authorized the Commission to approve charges that will lead to stable generation service in the future.

In the AEP Case, the Court held that AEP-Ohio's RSR was a lawful under § 4928.143(B)(2)(d). In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 43-59 (Sup. Ct. Ohio Apr. 21, 2016). However, the Court ruled that the RSR was barred by R.C. 4928.38. Id. at ¶ 14-40.

Unlike the appeal from this proceeding, the parties in the AEP Case did not raise – and a majority of the Court did not consider – whether (1) the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of § 4928.38, and (2) as the later-enacted statute, § 4928.143(B)(2)(d) cannot be not limited by § 4928.38.

B. A STABILITY CHARGE IS LAWFUL "NOTWITHSTANDING ANY OTHER PROVISION OF TITLE [49]"

In its Opinion and Order in this proceeding, the Commission approved DP&L's SSR pursuant to § 4928.143(B)(2)(d), which states:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
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> * * *
>
> (2) The plan may provide for or include, without limitation, any of the following:

* * *

> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

(Emphasis added.)

The "[n]otwithstanding" clause of § 4928.143(B) establishes that the SSR is lawful even if the Supreme Court were to conclude that the SSR constitutes a transition charge. Specifically, the sections that bar the recovery of transition costs are §§ 4928.141(A) and 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause. DP&L's SSR would thus be lawful even if the Court were to conclude that it was a transition charge.

In the AEP Case, the majority of the Supreme Court declined to consider whether the "[n]otwithstanding" clause saved AEP-Ohio's stability charge because "no party appears to have raised the issue." In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 38 n.3. Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the Commission to interpret the "notwithstanding" clause. Id. at ¶ 71-79.

In contrast to the AEP Case, both the Commission and DP&L have raised the "[n]otwithstanding" argument in their briefs to the Court. Jan. 20, 2015 Second Merit Brief Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, p. 20; Jan. 20, 2015, Second Merit Brief of Cross-Appellant The Dayton Power and Light Company, pp. 17-18.

The fact that the "[n]otwithstanding" argument was not considered by the Commission in its decision in this proceeding is irrelevant. The Supreme Court has "consistently held that a reviewing court is not authorized to reverse a correct judgment merely because

erroneous reasons were assigned as the basis thereof." Joyce v. General Motors Corp., 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990) (emphasis added). Accord: State ex rel. Cassels v. Dayton City School Bd. of Edn., 69 Ohio St.3d 217, 222, 631 N.E.2d 150 (1994) (per curiam) (same).[6]

Indeed, it is well-settled that a "statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments." Dillon v. Farmers Ins. of Columbus, Inc., 145 Ohio St.3d 133, 139, 2015-Ohio-5407, 47 N.E.3d 794, ¶ 17 (internal quotation marks and citations omitted). Accord: State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn., 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18-19 ("[T]he court should avoid that construction which renders a provision meaningless or inoperative.") (internal quotation marks and citation omitted).

In short, unlike the AEP Case, the Commission and DP&L have raised the "[n]otwithstanding" argument in their briefs before the Supreme Court. Although the issue was not considered by the Commission, the interpretation of § 4928.143(B)(2)(d) is a pure question of law, and Supreme Court precedent establishes that the Court "is not authorized to reverse a

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[6] That principle is well established in Ohio. In Ohio, "an appellate court must affirm a trial court's judgment if there are any valid grounds to support it." Schottenstein, Zox & Dunn, LPA v. C.J. Mahan Constr. Co., LLC, 10th Dist. Franklin No. 08AP-851, 2009-Ohio-3616, ¶ 16 (emphasis added). Accord: The Home Savings & Loan Co. v. Avery Place, LLC, 10th Dist. Franklin Nos. 13AP-777 and 13AP-778, 2014-Ohio-1747, ¶ 10 ["A]n appellate court must affirm the judgment on review if that judgment is legally correct on other grounds, as any error is not prejudicial in view of the correct judgment the trial court reached.") (emphasis added); Camastro v. Motel 6 Operating, L.P., 11th Dist. Trumbull No. 2000-T-0053, 2001 Ohio App. LEXIS 1936, at *15 n.8 (Apr. 27, 2001) ("[A] reviewing court passes only upon the correctness of the judgment, not the reasons therefor. Thus, an appellate court must affirm a trial court's judgment if upon review, any valid grounds are found to support it.") (citation omitted) (emphasis added); Evans v. Thrasher, 1st Dist. Hamilton No. C-120783, 2013-Ohio-4776, ¶ 11; State v. Eatmon, 4th Dist. Scioto No. 12CA3498, 2013-Ohio-4812, ¶ 15; Aurora Loan Servs. v. Brown, 12th Dist. Warren Nos. CA2010-01-010 and CA2010-05-041, 2010-Ohio-5426, ¶ 15; TP Mechanical Contrs., Inc. v. Franklin Cty. Bd. of Commrs., 10th Dist. Franklin No. 09AP-235, 2009-Ohio-3614, ¶ 12; Gunton Corp. v. Architectural Concepts, 8th Dist. Cuyahoga No. 89725, 2008-Ohio-693, ¶ 9; Merrill Lynch Mtge. Lending, Inc. v. 1867 W. Mkt., LLC, 9th Dist. Summit No. 23443, 2007-Ohio-2198, ¶ 7; Cook Family Invests. v. Billings, 9th Dist. Lorain Nos. 05CA008689 and 05CA008691, 2006-Ohio-764, ¶ 19; Van Deusen v. Baldwin, 99 Ohio App.3d 416, 420, 650 N.E.2d 963 (9th Dist. 1994); Salyer v. Farmers Ins. Co. of Columbus, Inc., 10th Dist. Franklin No. 94APE03-313, 1994 Ohio App. LEXIS 4402, at *14 (Sept. 27, 1994); Cosner v. Babcock & Wilcox Co., 92 Ohio App.3d 603, 605 636 N.E.2d 418 (9th Dist. 1993).

correct judgment merely because erroneous reasons were assigned as the basis thereof." Joyce, 40 Ohio St.3d at 96. The Commission's Order approving the SSR under § 4928.143(B)(2)(d) is lawful "[n]otwithstanding" the prohibition in other sections against the recovery of transition costs. R.C. 4928.143(B). Thus, Joint Movants' attempt to tie the fate of DP&L's SSR to AEP-Ohio's RSR is misplaced.

C. SECTION 4928.143(B)(2)(d) IS THE LATER-ENACTED STATUTE

1. The Later-Enacted Statute Controls

There is a separate and independent reason that the SSR does not violate the prohibition (passed in 1999) in § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the Commission authorized the SSR pursuant to § 4928.143(B)(2)(d). That section was included in Am.Sub.S.B. 221, which was passed in 2008, years after the transition costs statute was enacted.

Section 4928.143(B)(2)(d) was enacted after § 4928.38; therefore, a stability charge approved under § 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge under § 4928.38. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."). DP&L raised this issue in its Brief before the Commission,[7] and in its Brief before the Supreme Court. DP&L Merit Brief, pp. 19-20. That issue also was raised by the Commission and DP&L in their Supplemental Brief, pp. 6-9.

[7] May 20, 2013 The Dayton Power and Light Company's Initial Post-Hearing Brief (Public Version), p. 46 (Case No. 12-426-EL-SSO).

2. Section 4928.141(A) Does Not Bar the Recovery of "Equivalent" Charges

In its Opinion in the AEP Case, the Supreme Court of Ohio noted that § 4928.141(A), which was also included in Am.Sub.S.B. 221 (i.e., at the same time as § 4928.143(B)(2)(d)), includes a prohibition against the recovery of "'previously authorized allowances for transition costs.'" In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 17 (quoting § 4928.141(A)). That section does not change the analysis in the immediately preceding section of this Memorandum because the term "transition cost" is defined by statute, and DP&L's SSR does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). R.C. 4928.39(A) ("The costs were prudently incurred.") (emphasis added); R.C. 4928.39(B) ("The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 22.

In contrast, DP&L's SSR was set at an amount to allow DP&L to provide stable retail electric service in the future. Sept. 4, 2013 Opinion and Order, pp. 21-22, 25-26. The SSR amount was set based upon forecasts of DP&L's future revenues and expenses. Mar. 19, 2014 Second Entry on Rehearing, pp. 9-10. Therefore, the SSR does not recover "transition costs," as defined by statute, since the SSR is forward-looking.

AEP's RSR also was based on projections of future revenues and expenses. In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 24. In its decision in the AEP Case, the Supreme Court nevertheless held that AEP's RSR recovered the "equivalent" of

transition costs, and that AEP's RSR was thus barred by § 4928.38. Id. at ¶ 25. As demonstrated in the immediately-preceding section of this Memorandum, the statutory bar against recovering the "equivalent" of transition costs in § 4928.38 should not bar DP&L's recovery of the SSR, because DP&L has raised the argument that § 4928.143(B)(2)(d) is the later-enacted statute.

Section 4928.141(A) does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, § 4928.141(A) bars the recovery only of "transition costs." Since the SSR is forward-looking, it does not satisfy the statutory definition of transition costs, and it is not barred by § 4928.141(A).

That conclusion – that the equivalent of transition costs can be recovered through § 4928.143(B)(2)(d), and the recovery is not barred by § 4928.141(A) – is consistent with the structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide stable "retail electric service" (including generation service) through § 4928.143(B)(2)(d). Such a charge will necessarily be forward-looking. The General Assembly continued the prohibition against the recovery of transition costs (i.e., historic costs of constructing generation plants) in § 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in § 4928.143(B)(2)(d).

In short, the SSR is recoverable under § 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in § 4928.38 is inapplicable because § 4928.143(B)(2)(d) is the later-enacted statute. Further, the SSR is forward-looking and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in § 4928.141(A) is thus inapplicable.

These arguments were not raised by the parties in the AEP Case and, therefore, were not considered by the Supreme Court. That procedural deficiency is not present in the appeal from this proceeding. Since the Commission and DP&L have raised these significant statutory issues in the Supreme Court, the arguments supporting the SSR are not "nearly identical" to the arguments that supported AEP-Ohio's RSR. Joint Motion, p. 5. Modifying the SSR based on the AEP Case before the Court rules on these arguments would be inappropriate.

IV. REQUIRING DP&L TO COLLECT THE SSR SUBJECT TO REFUND WOULD BE CONTRARY TO OHIO LAW

Finally, Joint Movants' requested relief – an order requiring DP&L to collect the SSR subject to refund – would be contrary to longstanding Ohio law and Commission precedent. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. 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 for restitution of the increase in charges collected during the pendency of the appeal."). Accord: id. at 257 ("Under [§ 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.") (emphasis added).

Moreover, refunds violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Commrs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). Since the Commission already has issued an order providing for the SSR, the requested "refund" is forbidden by § 4905.32.

The Supreme Court of Ohio rejected a similar argument when reviewing AEP-Ohio's 2008 ESP case. In re Application of 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-Ohio'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 ("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 . . . . "); In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with the Request to Implement a Billing Cost Recovery Rider, Case No. 05-792-EL-ATA (Mar. 1, 2006 Opinion and Order), p. 14 (rejecting motion to collect rider subject to refund as contrary to Commission precedent). The Commission cannot deviate from this established caselaw in this proceeding. Notably, this governing authority should have been cited in the Joint Motion. Prof.Cond.R. 3.3 (Candor Toward the Tribunal).

The only authority cited by Joint Movants to support their requested relief is distinguishable. In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to Its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, Case Nos. 08-917-EL-SSO, et al. (May 25, 2011 Entry). Only after a remand from the Supreme Court, the Commission authorized AEP-Ohio to collect certain charges subject to refund, at the request of AEP-Ohio. Id. at 4. In other words,

AEP-Ohio consented to the collection of those charges subject to refund. Such consent also was given following the Supreme Court's recent remand in Columbus Southern Power. In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, et al., Case Nos. 10-2929-EL-UNC, et al. (May 18, 2016 Entry), p. 4 ("AEP Ohio, therefore, concludes that a cease and desist order would be unnecessary and inappropriate, particularly in light of the fact that the Commission has other means to protect the interests of both customers and the Company, such as by making the RSR subject to refund pending the completion of the remand process.").

Since DP&L has not consented to the collection of the SSR subject to refund, the Commission has no authority to require that action. Keco ,166 Ohio St. 254, at paragraph two of the syllabus; R.C. 4905.32.

V. CONCLUSION

The Joint Motion is yet another attempt by IEU and OCC to change the SSR in a manner that is not permitted by Ohio law. May 6, 2014 Complaint for Writs of Prohibition and Mandamus, Case No. 2014-0711 (dismissed by the Supreme Court on Oct. 22, 2014); Oct. 14, 2014 Joint Motion for a Stay by Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel, Case No. 14-1505 (denied by the Supreme Court on Feb. 18, 2015); June 8, 2015 Motion to Expedite Ruling on Appeal by the Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (denied by the Supreme Court on July 22, 2015).

The Commission should deny the Joint Motion because the Commission lacks jurisdiction in this case, the SSR is lawful, and collecting the SSR subject to refund would be unlawful.

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 of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel for an Order Requiring that the Service Stability Rider be Collected Subject to Refund has been served via electronic mail upon the following counsel of record, this 24th day of May, 2016:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to the Joint Motion of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel for an Order Requiring that the Service Stability Rider be Collected Subject to Refund electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company