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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.	)	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules.	)	Case No. 08-1097-EL-UNC
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 KROGER COMPANY'S MEMORANDUM CONTRA MOTIONS OF THE DAYTON POWER AND LIGHT COMPANY TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES AND WITHDRAW ITS APPLICATION

I. Introduction.

On July 27, 2016, in Case No. 08-1094-EL-SSO, et al., the Dayton Power and Light Company (DP&L) filed a motion to implement rates that it claims were in effect prior to the issuance of the Public Utilities Commission of Ohio's (Commission) September 4, 2013 Opinion and Order in Case No. 12-426-EL-SSO, et al.[1] That same day, in Case No. 12-426-EL-SSO, et al., DP&L filed a motion to both withdraw its application for approval of its second electric security plan (ESP 2) and also implement rates that it claims were in effect prior to the issuance of the Commission's September 4, 2013 Opinion and Order in Case No. 12-426-EL-SSO, et al.[2] The Commission should deny all three of DP&L's motions.

To begin with, the underlying rationale for why DP&L is seeking this relief is based on a fallacy. Contrary to what DP&L claims, the Supreme Court of Ohio did not reverse "in total" the Commission's decision on DP&L's ESP 2.[3] The lawfulness of DP&L's ESP 2, in its entirety, was not before the Court. The central issue before the Court concerned the lawfulness of DP&L's Service Stability Rider (SSR). The Court's decision must therefore be understood as

[1] DP&L Motion to Implement Previously Authorized Rates at 1, Case No. 08-1094-EL-SSO, et al. (July 27, 2016).

[2] DP&L Motion to Withdraw Application at 1, Case No. 12-426-EL-SSO, et al. (July 27, 2016) and DP&L Motion to Implement Previously Authorized Rates at 1, Case No. 12-426-EL-SSO, et al. (July 27, 2016).

[3] DP&L Motion to Implement Previously Authorized Rates, Memorandum in Support at 1, Case No. 08-1094-EL-SSO, et al.; DP&L Motion to Withdraw Application, Memorandum in Support at 1, Case No. 12-426-EL-SSO, et al.; DP&L Motion to Implement Previously Authorized Rates, Memorandum in Support at 1, Case No. 12-426-EL-SSO, et al.

reversing the Commission's approval of DP&L's SSR, not as DP&L argues, reversing the totality of the Commission's ESP 2 decision.

DP&L seems to be arguing that because the Commission modified its ESP 2 application in September 4, 2013, DP&L has the ongoing right to withdraw its ESP 2 application at any point in time in the future.[4] DP&L's ESP 2 application was modified and approved in 2013 and the standard service offer has been implemented by DP&L. Thus, DP&L has accepted the Commission's September 2013 modifications and forfeited its right to withdraw under R.C. 4928.143(C)(2)(a).

On the other hand, if DP&L is arguing that the Court's decision is a modification that then triggers a right to withdraw under R.C. 4928.143(C)(2)(a), DP&L is similarly misguided as the Commission has not acted to modify the ESP 2 application.

Notwithstanding DP&L's mischaracterization of the Court's decision, the rates and tariffs that DP&L seeks to implement constitute a patchwork of provisions cobbled together from both its ESP 1 and its ESP 2. The law does not authorize DP&L to cherry-pick a suite of provisions that it finds most favorable. Even assuming that DP&L may avail itself of the right to withdraw under R.C. 4928.143(C)(2)(a), pursuant to R.C. 4928.143(C)(2)(b), the Commission's authority is limited to continuing "the provisions, terms, and conditions of the utility's most recent standard service offer, along with any [adjustments for] fuel costs" until a new ESP is authorized. Granting DP&L's requested relief to blend its ESP 1 with its ESP 2 would be directly inconsistent with this statutory directive.

For these and other reasons stated below, DP&L's motions should be denied.

[4] DP&L Motion to Withdraw Application, Memorandum in Support at 1, Case No. 12-426-EL-SSO, et al.

II. Discussion.

A. The Court Did Not Reverse "in total" the Commission's Decision on DP&L's ESP 2. Context Shows that the Court Reversed the Commission's Authorization of DP&L's SSR.

DP&L's insistence that the Court reversed the Commission's ESP 2 decision "in total" is implausible. A proper reading of any legal text requires considerations of context.[5] As the U.S. Supreme Court has observed, "[i]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."[6] DP&L's disregard of context runs contrary to these principles.

The Court's decision on DP&L's ESP 2 provides in its entirety that "The decision of the [Commission] is reversed on the authority of *In re Application of Columbus S. Power Co.*, ___Ohio St.3d___, 2016-Ohio-1608,___N.E.3d___."[7] To understand the meaning of that sentence, it is important to first consider what the Court did in *In re Application of Columbus S. Power Co.* and then consider the issues before the Court with respect to the Commission's decision on DP&L's ESP 2.

The Court's decision in *In re Application of Columbus S. Power Co.* did not reverse the totality of the Commission's approval of AEP Ohio's ESP 2. Rather, as stated by the Court, the "most prominent" issue in that case concerned the Commission's approval of AEP Ohio's Retail Stability Rider (RSR).[8] In addressing that issue, the Court held that the Commission erred in approving the RSR because it permitted AEP Ohio to collect the equivalent of transition

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[5] *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, ¶ 26 (explaining that "context matters" when it comes to interpretation); *King v. Burwell*, 135 S.Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.").

[6] *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821).

[7] *In re Application of Dayton Power & Light Co.*, Slip Opinion 2016-Ohio-3490, ¶ 1.

[8] *In re Application of Columbus S. Power Co.*, 144 Ohio St.3d 1, 2016-Ohio-1608, ¶ 14.

revenue.[9] The only other aspect of the Commission's decision on AEP Ohio's ESP 2 that was reversed was in regards to setting the threshold of the significantly excessive earnings test (SEET).[10] The Court's reversal on these two issues clarifies what it meant when it said that the Commission's decision on DP&L's ESP 2 was reversed on the authority of *In re Application of Columbus S. Power Co.* Either the Court was: (1) reversing the Commission's approval of a mechanism that recovered the equivalent of transition revenue; (2) reversing the Commission's SEET-related directive; or (3) both. With this understanding in mind, it is appropriate to consider the issues in front of the Court on DP&L's ESP 2.

IEU-Ohio's notice of appeal on DP&L's ESP 2 challenged the Commission's approval of DP&L's SSR and the Commission's application of the ESP versus MRO test.[11] The Office of the Ohio Consumers' Counsel's (OCC) notice of appeal challenged the Commission's approval of the SSR, the lawfulness of the Commission's September 6, 2013 Nunc Pro Tunc entry, and certain procedural issues associated with the rehearing phase of the case.[12] DP&L's notice of cross-appeal challenged certain aspects associated with the Commission's authorization of the SSR-E, the Commission's directive to DP&L to transfer generating assets, and the Commission's directives on the competitive bidding process.[13] These issues defined the bounds of the Court's jurisdiction.[14]

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[9] Id.

[10] Id. at ¶ 64-66.

[11] IEU-Ohio Notice of Appeal at 2-6, Ohio Supreme Court Case No. 2014-1505 (August 29, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=752434.pdf.

[12] OCC Notice of Appeal at 2-4, Ohio Supreme Court Case No. 2014-1505 (September 22, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=753533.pdf.

[13] DP&L Notice of Cross-Appeal at 2-3, Ohio Supreme Court Case No. 2014-1505 (September 19, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=753463.pdf.

[14] *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 35-36 (noting lack of jurisdiction over issues not raised in a notice of appeal).

Out of this array of issues on DP&L's ESP 2, the only one that could be subject to the holding of *In re Application of Columbus S. Power Co.* is the issue pertaining to the Commission's approval of DP&L's SSR. This is true for two reasons. First, the central issue presented for the Court's consideration on DP&L's ESP 2 was whether the approval of the SSR authorized the receipt of unlawful transition revenue or its equivalent. IEU-Ohio and OCC relied heavily on *In re Application of Columbus S. Power Co.* in supplemental briefing as well as in oral argument to support this argument.[15] Second, no party raised a SEET issue on appeal. By process of elimination, the only issue that could thus be subject to *In re Application of Columbus S. Power Co.* is whether the approved SSR allowed DP&L to collect the equivalent of unlawful transition revenue.

As demonstrated by context, the Court's statement that it was reversing the Commission's decision on DP&L's ESP 2 based on the authority of *In re Application of Columbus S. Power Co.* can only mean one thing: the Court was reversing the Commission's authorization of DP&L's SSR. Any claim that the Court reversed the Commission's decision on DP&L's ESP 2 "in total" ignores the context of the case and is misleading.

B. DP&L Does Not Have the Perpetual Right to Withdraw its ESP 2 Application that the Commission Modified and Approved in 2013 When the Standard Service Offer has Been Implemented by DP&L for 2.5 Years.

Given that DP&L has accepted the Commission's September 2013 modifications and implemented its ESP 2 in order to collect charges from customers, DP&L has forfeited its right to withdraw under R.C. 4928.143(C)(2)(a). An ESP cannot be modified and approved by the Commission, and then accepted and implemented for 2.5 years prior to deciding to exercise its

[15] See Joint Motion of IEU-Ohio and OCC to Vacate the Orders of the Commission Authorizing the SSR and to Remand the Case to the Commission for Orders Consistent with the Court's Vacatur at 5, Case No. 2014-1505 (May 12, 2016) and Video Archive of Oral Argument, Case No. 2014-1505 (June 14, 2016), http://www.ohiochannel.org/video/case-no-2014-1505-in-re-application-of-dayton-power-light-co-to-establish-a-std-serv-offer-in-the-form-of-an-elec-sec-plan.

right to withdraw under R.C. 4928.143(C)(2)(a) for the Commission's past modifications. Such a result violates the plain meaning of the statute and would be unjust and unreasonable. If the Commission makes a modification to an ESP application and the utility is willing to accept that modification, R.C. 4928.143(C)(2)(a) does not apply.[16] That is exactly what happened in 2013. The Commission made modifications to DP&L's proposed ESP and DP&L chose not to exercise its right to withdraw its ESP, but instead, implemented the ESP with the Commission's modifications. Therefore, DP&L is now precluded from exercising its right to withdraw after it accepted the 2013 Commission modifications.

Just as the Court stated that it "would hardly be a 'just and reasonable result'" for the Commission to modify an ESP application after it had been approved and implemented,[17] it would be an unjust and unreasonable result for a utility to withdraw an application after it had been modified, approved, accepted, and implemented without further Commission modification.

A decision by the Court that determines the lawfulness of a provision of the ESP on appeal does not trigger a right to withdraw under R.C. 4928.143(C)(2)(a) as the Commission has not acted to modify the ESP 2 application as contemplated by the statute. DP&L cannot read into the statute words that do not exist.[18] Further, the Commission has no authority to act beyond its statutory powers.[19] The statute does not speak to a utility's right to withdraw an ESP application upon findings by the Court that a provision of the ESP is unlawful on appeal.

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[16] *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 26.

[17] Id. at ¶ 30 (citing R.C. 1.47(C)).

[18] *In re Application of E. Ohio Gas Co.*, 141 Ohio St.3d 336, 2014-Ohio-3073, ¶ 28.

[19] *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 32 (citing *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53).

Therefore, the withdrawal right under R.C. 4928.143(C)(2)(a) is not triggered and DP&L has no right to withdraw its application 2.5 years after it was accepted and implemented.

C. R.C. 4928.1343(C)(2)(b) Does Not Permit a Utility to Blend Rates and Tariffs Across Multiple ESPs.

Even assuming that DP&L may avail itself of the right to withdraw under R.C. 4928.143(C)(2)(a), DP&L's proposal to implement rates from its ESP 1 case veers markedly from what the statute requires. Under R.C. 4928.143(C)(2)(b), when a utility requests to terminate an ESP application "the [C]ommission 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 [adjustments for] fuel costs" until a new ESP is authorized. There is no ambiguity in that provision. A utility cannot pick and choose which provisions it would like to implement and the Commission cannot authorize a utility to blend provisions across separate ESPs. But that is exactly what DP&L is requesting to do.

Perhaps recognizing the disruptions that would ensue if it reverted to its ESP 1 framework and abandoned the market-based construct for setting its SSO pricing, DP&L admits that it has no intention to follow the law and "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."[20] Instead, DP&L specifically states that two riders and tariffs from ESP 1 would be implemented as they existed in 2013 prior to the Commission's approval of ESP 2, while certain distribution, transmission, and generation tariffs that are currently in place pursuant to ESP 2 would remain in effect as they exist today, while other tariff provisions that exist today would be eliminated.[21]

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[20] R.C. 4928.143(C)(2)(b).

[21] DP&L Notice of Filing Proposed Tariffs at 2, Case No. 08-1094-EL-SSO, et al. (August 1, 2016).

DP&L also states its intent to honor existing contracts with winning competitive bid suppliers and reflect the competitive bid rate in its SSO pricing that was established in ESP 2.[22] The problem with DP&L's commitment to continue its market-based generation pricing is that it has no grounding in DP&L's ESP 1 offer. DP&L's move to market began with its ESP 2, not its ESP 1.[23]

While it may be understandable that DP&L would seek to minimize customer disruptions by continuing the SSO auction process for its generation pricing, the statute does not permit DP&L to pick and choose which provisions will continue if it chooses to withdraw an ESP. If DP&L has the right to withdraw its ESP under the circumstances of this case, it is DP&L's choice as to whether DP&L actually withdraws its ESP and disrupts its current SSO auction process and pricing and other provisions embedded in its ESP 2. DP&L cannot, however, elect to continue certain favorable provisions of its ESP 2 and certain favorable provisions of its ESP 1. As provided by R.C. 4928.143(C)(2)(b), DP&L must adhere to the framework embodied in its ESP 1, not blend provisions from its ESP 1 together with its ESP 2. Granting DP&L's request to blend two separate ESPs together plainly violates R.C. 4928.143(C)(2)(b).

D. DP&L Should Not Be Permitted to Continue the Service Stability Rider Under the Guise of the Rate Stabilization Charge.

DP&L's proposal to implement the Rate Stabilization Charge (RSC) from ESP 1 appears to be an attempt to circumvent the Court's ruling which reversed the Commission's authorization of DP&L's SSR. In its proposed tariffs, DP&L describes the RSC as a mechanism that "is intended to compensate DP&L for providing stabilized rates for customers."[24] This description

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[22] Id.

[23] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, Case No. 12-426-EL-SSO, et al., Opinion and Order at 15-16 (September 4, 2013).

[24] DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Fourth Revised Sheet No. G25, Page 1 of 2.

is remarkably similar to the language DP&L used to characterize the SSR: "The [SSR] is intended to compensate DP&L for providing stabilized service for customers."[25] These matching descriptions show DP&L's understanding that the RSC is intended to function much in the same way as the now-discredited SSR. Given that the PUCO's authorization of DP&L's SSR has been declared unlawful, implementation of the RSC would raise similar concerns that it is being used to collect the equivalent of unlawful transition revenue. This conclusion is reinforced by witness testimony from DP&L's ESP 2. During that proceeding, one witness described the unlawful SSR as a "de facto extension and expansion" of the former RSC included in ESP 1.[26] To the extent DP&L is seeking to continue the SSR under the guise of the RSC, DP&L is attempting to bypass the Court's ruling which held as unlawful the Commission's authorization of the SSR.

III. Conclusion.

For the foregoing reasons, DP&L's motions should be denied.

Respectfully submitted,

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[25] DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Third Revised Sheet No. G29, Page 1 of 1.

[26] See Direct Testimony of Kevin C. Higgins at 5-6, Case No. 12-426-EL-SSO, et al. (March 1, 2013) and Vol. VII Tr. at 1686, Case No. 12-426-EL-SSO, et al.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 11, 2016.

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