

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 08-1094-EL-SSO
for Approval of Its Electric Security Plan.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 08-1095-EL-ATA
for Approval of Revised Tariffs.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 08-1096-EL-AAM
for Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code §4905.13.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 08-1097-EL-UNC
for Approval of Its Amended Corporate)	
Separation Plan.)	

**INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS CONCERNING
THE DAYTON POWER AND LIGHT COMPANY'S PROPOSED TARIFF SHEETS**

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AUGUST 12, 2016

**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-
OHIO**

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On July 27, 2016, The Dayton Power and Light Company (“DP&L”) filed motions with the Public Utilities Commission of Ohio (“Commission”) in this matter (“*ESP I Case*”) and in Case Nos. 12-426-EL-SSO, *et al.* (“*ESP II Case*”) seeking orders approving its request to withdraw from its current electric security plan (“ESP”) and to implement rates “consistent” with rates in effect prior to September 4, 2013 under R.C. 4928.143. On August 1, 2016, DP&L filed in this matter a Notice of Filing Proposed Tariffs (“Proposed Tariffs”) to implement rates it claimed were “consistent” with its rates prior to September 4, 2013.

As demonstrated in IEU-Ohio's Memorandum in Opposition, DP&L's attempt to selectively withdraw and replace some of its rates is unlawful and unreasonable. DP&L's current ESP has not been modified by the Commission and therefore DP&L has no right to withdraw from its current ESP.¹ Instead, the Commission is under a mandate from the Ohio Supreme Court ("Court") to direct DP&L to terminate billing and collecting the Service Stability Rider ("SSR") rates.² As it has done previously, the Commission should reject this attempt to implement a reduced version of a nonbypassable charge declared unlawful by the Court.³

Even if DP&L had a right to withdraw its current ESP, the proposed tariff sheets do not comply with the requirements of R.C. 4928.143(C)(2)(b) and are otherwise unjust and unreasonable. Under R.C. 4928.143, if an electric distribution utility ("EDU") lawfully elects to withdraw from an ESP following a Commission-ordered modification to the ESP, "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." To bring the proposed tariffs into conformity with the requirements of R.C. 4928.143(C)(2)(b) and to otherwise

¹ See Memorandum in Opposition to the Motions of The Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates (Aug. 11, 2016) ("Memorandum in Opposition").

² Furthermore, consistent with the Commission's decision in Case Nos. 11-4920-EL-RDR, *et al.*, the Commission must direct DP&L to prospectively adjust rates to account for money collected to date through the SSR. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, PUCO Case Nos. 11-4920-EL-RDR, Entry at 7-8 (June 29, 2016).

³ See *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.*, Entry on Rehearing at 13 (Dec. 14, 2011) ("AEP ESP I Case") [refusing to allow AEP-Ohio to implement its provider of last resort ("POLR") charge from its Rate Stabilization Plan ("RSP") case after the ESP POLR charge was declared unlawful].

establish just and reasonable rates, the Commission would need to order the following changes to DP&L's proposed tariffs:

1. Direct DP&L to delete its TTCRR-B and TCRR-N tariff sheets and implement the bypassable TCRR authorized in the *ESP I Case*. The Commission must also direct DP&L to modify its billing practices for transmission services to bring them into alignment with the requirements of federal law;
2. Modify the proposed Rider RSC tariff sheets to reflect the conditional bypassability of POLR charges under Commission precedent generally and specifically under DP&L's *ESP I Stipulation*;
3. Direct DP&L to remove its request for shared savings from its application in Case No. 16-329-EL-RDR to update its Energy Efficiency Rider rates. With this modification, the Commission should direct DP&L to implement the Energy Efficiency Rider rates proposed in that application. In any event, the Commission should authorize the substantial reduction in Energy Efficiency Rider rates proposed by DP&L in this application;
4. Direct DP&L to delete the Storm Cost Recovery Rider tariff sheet;
5. Direct DP&L to delete the Reconciliation Rider tariff sheet; and
6. Direct DP&L to terminate the billing and collection of the SSR rates. The Commission should then initiate a proceeding to determine the appropriate prospective adjustment to DP&L's rates to reverse the unlawful

authorization of the SSR, consistent with the Court's and Commission's precedent.

I. ARGUMENT

A. DP&L must return to a fully bypassable TCRR

Under the ESP I, DP&L's TCRR was fully bypassable. The TCRR collected all costs imposed on DP&L by PJM Interconnection, Inc. ("PJM") for market-based and non-market based transmission services associated with serving standard service offer ("SSO") customers. This outcome was consistent with Rule 4901:1-36-04(B), Ohio Administrative Code ("O.A.C."), which requires the TCRR to be bypassable by shopping customers.

Under DP&L's ESP II, the Commission waived the bypassability requirement in Rule 4901:1-36-04(B), O.A.C., and allowed DP&L to implement a bypassable and nonbypassable version of the TCRR, the TCRR-B (recovering market-based costs) and TCRR-N (recovering non-market based costs). Currently, the TCRR-B is set to zero as market-based transmission services associated with SSO customers are provided by SSO auction winners and paid for through the auction price.

DP&L's proposed tariffs do not include any proposed changes to its TCRR-B or TCRR-N. This failure is inconsistent with the requirement to return to the "provisions, terms, and conditions" of DP&L's prior ESP. DP&L does not offer any rationale for its failure to propose transmission tariffs consistent with its prior ESP as required by R.C. 4928.143(C)(2)(b). Accordingly, if DP&L has a right to withdraw from its current ESP, the proposed tariff sheets are not lawful because they do not contain a fully bypassable TCRR as existed under its prior ESP.

Even if R.C. 4928.143(C)(2)(b) did not mandate a return to a fully bypassable transmission rider, the law requires such a result. Rule 4901:1-36-04(B), O.A.C. specifies that “[t]he transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers.” The requirements of Chapter 4901:1-36, O.A.C., may be waived upon good cause shown unless the requirement is otherwise required by the law. Rule 4901:1-36-02(B), O.A.C. Although DP&L was granted a waiver of the bypassable TCRR requirement in the *ESP II Case*, DP&L proposes to withdraw from the orders providing such a waiver, thereby effectively terminating the waiver. DP&L has failed to request a new waiver of the bypassability requirement and has not otherwise offered any basis for the Commission to find that good cause exists to grant DP&L a new waiver of the bypassability requirement.

Moreover, the Commission may not lawfully authorize a waiver of the bypassability requirement, may not authorize the continuation of the TCRR-N, and must modify DP&L’s billing practices under its transmission tariffs to bring them into conformity with federal requirements.

The Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over unbundled transmission service in states such as Ohio and, accordingly, the Commission may not authorize DP&L to bill and collect for FERC-regulated transmission service in a manner that is inconsistent with the FERC-approved rates.⁴

Under Order 888, FERC ordered functional unbundling of wholesale generation and transmission services. FERC also imposed a similar open access requirement on

⁴ Federal Power Act § 201(B)(1), 16 U.S.C. § 824(b)((1).

unbundled retail transmission service in interstate commerce.⁵ If a state has unbundled its retail electric service, then FERC may require the utility to transmit a competitor's electricity over its lines on the same terms that the utility applies to its own energy transmission.⁶

Under FERC's supervision and regulation, PJM is the regional transmission organization ("RTO") that controls the transmission system that covers DP&L's service area. PJM's Open Access Transmission Tariff ("OATT") governs the terms, conditions, and requirements under which a Transmission Customer may receive transmission service from PJM. Under the OATT, a Transmission Customer is any Eligible Customer that meets certain contracting requirements.⁷ An Eligible Customer includes "[a]ny retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider or a Transmission Owner offer the transmission service, or pursuant to a voluntary offer of such service by a Transmission Owner."⁸ Ohio requires an EDU such as DP&L to unbundle retail electric services.⁹ By definition, therefore, the PJM OATT provides that retail customers may secure transmission service directly under the federally-approved tariff rates.

DP&L's TCRR-N is nonbypassable and, as such, requires all retail customers in DP&L's certified service area to obtain non-market -based transmission service from

⁵ *New York v. FERC*, 535 U.S. 1 (2002).

⁶ *Id.*

⁷ PJM OATT, Section I.1 (Definitions T-U-V at 2) (eff. 7/18/16), available at: <http://pjm.com/documents/agreements.aspx>.

⁸ PJM OATT, Section I.1 (Definitions E-F at 2) (eff. 7/18/16), available at: <http://pjm.com/documents/agreements.aspx>.

⁹ R.C. 4928.07 and 4928.31.

DP&L. Even if the Commission were to find that the TCRR-N does not expressly forbid DP&L's customers from taking service under PJM's OATT, a nonbypassable transmission rider has the same effect, as customers would be required to pay twice for non-market based transmission service. Thus, DP&L's TCRR-N implicitly if not explicitly prohibits DP&L's retail customers from directly taking transmission service under PJM's OATT. Because this result conflicts with and frustrates the purpose of the FERC-authorized tariffs, the TCRR-N tariffs are preempted and void.

Further, the manner in which DP&L bills the demand portion of the TCRR-N rate and the manner in which DP&L previously billed the demand portion of the TCRR frustrates and conflicts with the cost allocation methodology endorsed by FERC.¹⁰ The PJM OATT allocates Network Integration Transmission Service ("NITS") costs through each customer's peak load contribution ("PLC") to the single highest peak load in each transmission pricing zone [the "1 CP" or network services peak load ("NSPL") methodology]. The PJM rate design advances the goal of encouraging customers to manage their peak loads and thereby assists PJM in managing system reliability.¹¹

Although DP&L assigns NITS costs to customer classes based upon the 1 CP/NSPL methodology, it does not bill customers based upon each customer's

¹⁰ FERC has previously stated that "[a]ccess charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation" in order to "encourage load response during periods when generation or transmission are in short supply and prices are rising." *Occidental Chemical Corp. v. PJM*, 102 FERC ¶ 61,275 at ¶14, 16 (2003).

¹¹ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Direct Testimony of Kevin M. Murray (IEU-Ohio Ex. 1B) at 32 (June 6, 2014) ("AEP ESP III Case") (PJM allocation of NITS costs provides a transparent price signal).

individual NSPL under the TCRR-N and did not do so under the TCRR either.¹² Instead, DP&L bills customers based upon the customers' monthly billing demands, as defined in DP&L's tariff. For a DP&L customer receiving service at primary or secondary voltage, for example, monthly billing demand is calculated as the greatest 30-minute period of demand during one of the following: (1) 75% of a customer's monthly off-peak usage defined as between 8:00 p.m. and 8:00 a.m.; (2) 100% of a customer's monthly on-peak demand defined as between 8:00 a.m. and 8:00 p.m.; and (3) 75% of the greatest off-peak or on-peak demand during the months of June, July, August, December, January, or February during the past 11-month period prior to the current billing month.¹³ DP&L's monthly billing demand methodology is detached from a customer's actual usage during a system peak and therefore does not send customers an appropriate price signal to reduce usage during system peaks. Accordingly, DP&L's monthly billing demand methodology contained in both the TCRR-N and TCRR frustrates and conflicts with the FERC-approved tariffs.

Accordingly, if DP&L may lawfully withdraw its ESP II application, DP&L's transmission tariff must be modified to reflect a fully bypassable TCRR, and DP&L's transmission tariff sheets (regardless of whether the charge is bypassable or nonbypassable) must be modified to align DP&L's billing practices for transmission services with the requirements under federal law.

¹² *In the Matter of the Application of The Dayton Power and Light Company to Update its Transmission Cost Recovery Rider – Non-Bypassable*, Case No. 15-361-EL-RDR, Amended Application at Schedule B-1 (April 28, 2015); *Id.* at Schedule A-1, Ninth Revised Sheet No. T8, page 3 of 4 (April 28, 2015).

¹³ *Id.*; DP&L Electric Distribution Service Tariff Thirteenth Revised Sheet Nos. D19 and D20, available at: <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Dayton%20Power%20and%20Light%20Company/PUCO%2017%20Distribution.pdf>.

B. The proposed Rate Stabilization Charge (“RSC”) tariff sheets should be modified to provide for the conditional bypassability of the RSC by customers who agree to return to the SSO at market-based rates

While it is unlikely that the Commission could or would authorize the RSC as a term and condition of an ESP under Court and Commission decisions issued since its authorization of the charge as a term of ESP I,¹⁴ the Commission lacks the authority to implement the prior RSC because DP&L cannot properly withdraw the current ESP application for the reasons discussed above. At a minimum the tariff sheets filed by DP&L should be modified to provide for conditional bypassability by customers who agree to return the SSO at market-based rates.

The RSC rates can trace their genesis to Case No. 02-2279-EL-ATA (“*RSP Case*”). In DP&L’s *RSP Case*, the Commission approved a stipulation that allowed DP&L to request a POLR charge, the RSC, of up to 11% of the tariffed generation charges as of January 1, 2004.¹⁵ Following the approval of the RSP, DP&L filed in Case No. 05-276-EL-AIR its request to implement the RSC.¹⁶ DP&L offered evidence to justify the RSC charge in the form of testimony of Kurt G. Strunk. As justification for the magnitude of the RSC charge, Mr. Strunk relied on the Black-Scholes methodology.¹⁷ As part of a

¹⁴ The Ohio Supreme Court has reversed the Commission’s authorization of a POLR charge that relied upon the Black-Scholes methodology, concluding that the methodology was not a reliable means to approximate an EDU’s POLR costs. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 26-30. The Commission subsequently rejected an attempt to justify a POLR charge on the basis of the Black-Scholes methodology. *AEP ESP I Case*, Order on Remand at 28 (Oct. 3, 2011).

¹⁵ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 2 (Dec. 28, 2005) (“*RSC Case*”); see also *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶4 (“With respect to those customers not taking generation service from DP&L, the rate stabilization surcharge would act as a mechanism for the recovery of ‘provide-of-last-resort’ (‘POLR’) costs.”; *Id.* at ¶18, 24-26.

¹⁶ *RSC Case*, Application at 2 (Apr. 4, 2005).

¹⁷ *RSC Case*, Rebuttal Testimony of Kurt G. Strunk, *in passim* (Oct. 31, 2005).

Commission-approved stipulation in the *RSC Case*, the Commission authorized the maximum 11% increase through of the RSC, translating to an annual charge of approximately \$76 million.¹⁸ The approved ESP I stipulation provided for the rider to remain in place through December 31, 2012.¹⁹

If the Commission allows the RSC to be implemented, the proposed tariff sheet needs to be modified to reflect the requirements of DP&L's ESP I and Commission precedent. As of December 31, 2012, government aggregation customers were authorized to "elect not to pay the [RSC]" and if they made such an election and subsequently returned to the SSO they would do so "at a market-based rate."²⁰ The Commission has concluded that the terms, conditions, and charges of DP&L's ESP that existed as of December 31, 2012 were part and parcel of the same ESP and "[t]he Commission cannot arbitrarily choose some of the various provisions of the ESP to continue after the termination date of the ESP and choose other provisions of the ESP not to continue."²¹ Furthermore, Commission precedent requires all POLR charges to be bypassable by customers who agree to return to the SSO at market-based prices.²² DP&L's current and proposed SSO are market-based and therefore the proposed RSC should be bypassable by all customers.

¹⁸ *RSC Case*, Opinion and Order at 11 (Dec. 28, 2015).

¹⁹ Stipulation and Recommendation at 4 (Feb. 24, 2009).

²⁰ *Id.*

²¹ Entry on Rehearing at 5 (Feb. 19, 2013).

²² *AEP ESP I Case*, Opinion and Order at 40 (Mar. 18, 2009).

Accordingly, if the Commission does not reject the proposed RSC tariff sheets in their entirety because DP&L cannot lawfully withdraw its ESP II application, the Commission should direct DP&L to revise its proposed RSC tariff sheets to reflect the ability of customers to elect not to pay the RSC if they agree to return to the SSO at a market-based rate.

C. The Commission should direct DP&L to file revised Energy Efficiency Rider tariffs

DP&L has not proposed any change to its Energy Efficiency Rider tariff sheets. However, the current Energy Efficiency Rider is inconsistent with the authorization of the charge under the ESP I and the authorized version of the rider in effect on September 4, 2013, neither of which permitted DP&L to collect shared savings. DP&L's current Energy Efficiency Rider has also substantially over-recovered costs from customers. Accordingly, the Commission should direct DP&L to reduce its Energy Rider rates as proposed in DP&L's March 2016 application.²³ Furthermore, if the Commission authorizes DP&L to withdraw from its current ESP, the Commission should further require DP&L to remove the collection of any shared savings from the Energy Efficiency Rider rates.

Upon a lawful request to withdraw from an ESP, 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."²⁴ In its July 27, 2016 motion, DP&L requests that the Commission authorize DP&L "to implement rates ... that are consistent with the rates that

²³ *In the Matter of the Application of The Dayton Power and Light Company to Update its Energy Efficiency Rider*, Case No. 16-329-EL-RDR, Application (Mar. 14, 2016) ("EE Rider Update Case").

²⁴ R.C. 4928.143(C)(2)(b).

were in effect before the Commission's September 4, 2013 Opinion and Order."²⁵ As part of its prior SSO (ESP I), DP&L was authorized to implement its Energy Efficiency Rider.²⁶ Under the authorization of the ESP I and as reflected in the rates in effect prior to and including September 4, 2013, DP&L had no authorization to collect any shared savings under its Energy Efficiency Rider.²⁷ (The authorization to recover shared savings under the rider first occurred with rates effective March 1, 2014.²⁸) Thus, the collection of shared savings is inconsistent with DP&L's rates under its prior ESP. In order to bring the Energy Efficiency Rider rates into compliance with the authorization of the ESP I and the rates in effect on September 4, 2013, the Commission must direct DP&L to modify its rider rates to remove any revenue collection associated with shared savings.

Furthermore, DP&L's Energy Efficiency Rider rates should be modified to correct the substantial over-recovery under the rider. As reflected in its March 2016 application to update the rider, DP&L has an over-recovery of \$7.6 million and \$10 million associated with residential and non-residential rates, respectively.²⁹ Independent of the shared savings issue, the Commission should minimize the substantial burden DP&L's nonbypassable charges have had on DP&L's customers and authorize DP&L's proposal to reduce its Energy Efficiency Rider rates.

²⁵ Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates at 1 (July 27, 2016).

²⁶ Opinion and Order at 5 (June 24, 2009).

²⁷ *Id.*

²⁸ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2013 through 2015*, Case Nos. 13-833-EL-POR, *et al.*, Opinion and Order (Dec. 4, 2013) ("*Portfolio Plan Case*"); *Portfolio Plan Case*, Finding and Order (Feb. 19, 2014); *Portfolio Plan Case*, Compliance Tariff Filing (Mar. 3, 2014).

²⁹ *Id.* at Schedules B-1, B-2, C-1, C-2.

D. The Commission should direct DP&L to eliminate its Storm Damage Cost Recovery Rider and its Reconciliation Rider

DP&L's Storm Damage Recovery Rider and Reconciliation Rider were first approved in DP&L's ESP II Case.³⁰ If DP&L withdraws from the ESP II, then these charges should be deleted from DP&L's tariffs.

E. The Commission should direct DP&L to terminate the billing and collection of the SSR. The Commission should then initiate a proceeding to determine the amount of revenue that was unlawfully collected under the SSR and adjust rates based upon that determination, consistent with the Commission's and the Court's precedent

DP&L has proposed to entirely remove the SSR from its tariff. The Commission is under a mandate from the Court to reverse its authorization of the SSR. The Commission has no discretion to ignore this mandate.³¹ Accordingly, and independent of any authorization of DP&L's proposal to withdraw from its ESP and proposed tariffs, the Commission must immediately issue an order directing DP&L to cease collecting any revenue through the SSR.

Additionally, and consistent with the Commission's and Court's precedent, the Commission should initiate a proceeding to determine the amount of revenue DP&L has collected under the unlawfully authorized SSR. After making that determination, the Commission should prospectively adjust DP&L's rates to account for the unlawfully collected SSR revenue.

This outcome is consistent with the Commission's recent precedent. In an order dated August 1, 2012 in AEP-Ohio's *PIRR Case*, the Commission prospectively modified

³⁰ *ESP II Case*, Opinion and Order at 34-35, 41-42 (Sep. 4, 2013).

³¹ *Nolan v. Nolan*, 11 Ohio St.3d 1, 5 (1984).

the interest rate that was to be applied to the outstanding deferrals from AEP-Ohio's first ESP, reducing the interest rate from 11.15% based on AEP-Ohio's weighted-average cost of capital ("WACC") to 5.34% based on AEP-Ohio's cost of long-term debt.³² That modification occurred after the termination of AEP-Ohio's *ESP I* Case. On June 2, 2015, the Court reversed the Commission's order reducing the interest rate and remanded the case to the Commission "for reinstatement of the WACC rate."³³

On May 23, 2016, AEP-Ohio proposed rates that reflected reinstating the 11.15% interest rate as of August 1, 2012, the date the Commission ordered the reduction.³⁴ On June 29, 2016, the Commission approved AEP-Ohio's rates that reflected resetting interest rates as of August 1, 2012.³⁵ The Commission noted that "[a]lthough the Court did not specify an effective date for reinstatement of the WACC rate, we find that the Court's decision, taken in its entirety, requires that the WACC rate be reinstated in full, such that AEP Ohio is able to recover its PIRR deferral balance, at the WACC rate, for the entire recovery period."³⁶ That is, in its June 29, 2016 order, the Commission authorized a prospective change to AEP-Ohio's PIRR rates based on a recalculation of revenue lost due to the interest rate reduction between August 1, 2012 and June 29, 2016. In authorizing the prospective change to rates based on revenue lost over the prior four years, the Commission noted that the Court did not "find that *Keco* precluded the

³² *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order (Aug. 1, 2012) ("*AEP PIRR Case*").

³³ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 43.

³⁴ *AEP PIRR Case*, Entry at 2-3 (June 29, 2016).

³⁵ *Id.* at 7.

³⁶ *Id.*

collection” of this revenue lost due to the Commission’s unlawful action reversed by the Court.³⁷

These same factors are present here and therefore warrant prospective modifications to DP&L’s rates to remedy the collection of approximately \$280 million under the SSR. In reversing the Commission’s authorization of the SSR, the Court issued a one sentence decision that provides: “The decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___.” (hereinafter, “*Columbus Southern*”).³⁸ Thus, taken in its entirety, the Commission must look towards the *Columbus Southern* case to guide the Commission’s actions following the reversal of the authorization of the SSR.

In the *Columbus Southern* case, the Commission authorized the Retail Stability Rider (“RSR”) for AEP-Ohio. The RSR and SSR were substantially similar, and the Commission explicitly relied on its rationale for authorizing the RSR when it authorized the SSR.³⁹ However, the Court found that the nature of the RSR served the same purpose as a transition charge and concluded that AEP-Ohio’s RSR unlawfully allowed AEP-Ohio to collect transition revenue or its equivalent.⁴⁰ The Court then directed the

³⁷ *Id.*

³⁸ *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490, ¶ 1.

³⁹ *ESP II Case*, Opinion and Order at 17, 22, 25; *see also Columbus Southern*, S.Ct. Case No. 2013-521, Merit Brief of Amicus Curiae DP&L in Support of Appellee PUCO at 6 (Oct. 21, 2013) (in its amicus brief DP&L asserted that the record supporting AEP-Ohio’s RSR “closely resembles” the record supporting its SSR).

⁴⁰ *Columbus Southern*, at ¶ 22-25.

Commission on remand to make prospective adjustments to AEP-Ohio's RSR to account for the revenue AEP-Ohio unlawfully collected under the rider.⁴¹

In its decisions reversing AEP-Ohio's RSR and DP&L's SSR, the Court did not find that *Keco* barred the Commission from making prospective adjustments to the riders to account for past unlawful collections under the rider. In fact, the Court explicitly ordered the Commission to do just that in the *Columbus Southern* case and implicitly directed the Commission to do that in the *DP&L* case when it directed the Commission to the *Columbus Southern* case for the authority supporting the reversal of the SSR.

Thus, based on the Commission's and Court's precedent, the Commission should direct DP&L to cease billing and collection of the SSR, initiate a proceeding to determine the amount of revenue DP&L collected under the SSR, and direct DP&L to make prospective adjustments to its rates to account for the unlawful revenue DP&L collected under the SSR since January 1, 2014.

II. CONCLUSION

For the foregoing reasons, the Commission should comply with the Court's mandate and direct DP&L to cease the billing and collection of the SSR. The Commission need not entertain DP&L's request to withdraw its ESP II application and replace one unlawful generation subsidy with another. If, however, the Commission grants DP&L's request to withdraw from its current ESP, then the Commission should order DP&L to make the modifications to its tariff sheets discussed herein.

⁴¹ *Id.* at ¶ 39-40.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Comments Concerning The Dayton Power and Light Company's Proposed Tariff Sheets* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 12th day of August, 2016, via electronic transmission.

/s/ Matthew R. Pritchard

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Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Comments Industrial Energy Users-Ohio's Comments Concerning The Dayton Power and Light Company's Proposed Tariff Sheets electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio