

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

**THE KROGER COMPANY’S COMMENTS
ON THE DAYTON POWER AND LIGHT COMPANY’S PROPOSED TARIFFS**

I. Introduction.

In accordance with the Public Utilities Commission of Ohio’s (Commission) Entry dated August 3, 2016,¹ The Kroger Company (Kroger) respectfully offers comments on The Dayton Power and Light Company’s (DP&L) proposed tariffs filed in the above-captioned proceedings.² DP&L has attempted to support its proposed tariffs through the filing of three motions spread across two separate dockets.³ Through these motions, DP&L sought to withdraw the application

¹ Entry at 3 (August 3, 2016).

² DP&L Notice of Filing Proposed Tariffs at 1 (August 1, 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

for its second electric security plan (ESP 2) and implement rates that it alleges are consistent with its first ESP (ESP 1). Kroger filed a memorandum contra to these three motions on August 11, 2016 and those arguments are incorporated by reference as if fully rewritten herein.⁴ For the reasons stated below, as well as for the reasons set forth in Kroger's previously-filed memorandum contra, the Commission should deny DP&L's request to implement its proposed tariffs.

The Commission should also immediately halt the collection of DP&L's Service Stability Rider (SSR). Acting to stop the unlawful collection of the SSR will implement the Supreme Court of Ohio's decision which reversed the Commission's approval of DP&L's SSR. Permitting DP&L to continue to collect unlawful transition revenue or its equivalent through the SSR is harmful to customers. For almost three years customers have been paying this unlawful charge, it is imperative that the Commission act quickly to end this unlawful collection.

II. Comments.

A. The Court Did Not Reverse "in total" the Commission's Decision on DP&L's ESP 2.

Before addressing the substance of the proposed tariffs, DP&L's rationale for its proposal must be considered. DP&L states that it filed its proposed tariffs in response to the Supreme Court of Ohio's decision in *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490, which according to DP&L, reversed "in total" the Commission's decision on DP&L's ESP 2.⁵ But that portrayal of the Court's ruling completely ignores the context in which the appeal of DP&L's ESP 2 arose. Placed in its appropriate context, the Court's decision must

al.; DP&L Motion to Implement Previously Authorized Rates, Memorandum in Support at 1, Case No. 12-426-EL-SSO, et al.

⁴ Kroger Memorandum Contra Motions of DP&L to Implement Previously Authorized Rates and Withdraw its Application, Case No. 08-1094-EL-SSO, et al. and Case No. 12-426-EL-SSO, et al. (August 11, 2016).

⁵ DP&L Notice of Filing Proposed Tariffs at 1.

be understood as a reversal of DP&L's unlawful SSR, not a wholesale reversal of the Commission's decision on DP&L's ESP 2.⁶

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 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

⁶ *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, ¶ 26 (explaining that "[c]ontext 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.").

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.

⁹ *Id.*

¹⁰ *Id.* at ¶ 64-66.

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

Out of this set of issues on DP&L's ESP 2, the only issue that could be subject to the holding of *In re Application of Columbus S. Power Co.* is the one pertaining to the Commission's approval of DP&L's SSR. 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 the oral argument in supporting

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).

their appeals.¹⁵ Second, no party raised a SEET issue on appeal. By process of elimination, the only issue that could 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.

Accordingly, 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 almost 3 Years.

DP&L should not be permitted to withdraw its ESP 2 application and implement the proposed tariffs which it claims are consistent with the Commission's June 24, 2009 decision on DP&L's ESP 1 and in effect before the Commission's ESP 2.¹⁶ On September 4, 2013, the Commission modified and approved DP&L's ESP 2 application. DP&L thereafter accepted these modifications, implemented its ESP 2, and has been collecting charges from customers under its ESP 2 ever since, including the unlawful SSR. 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) and implement tariffs from its most recent standard service offer (i.e., DP&L's ESP 1) pursuant to R.C. 4928.143(C)(2)(b). The Commission has previously held that a utility's implementation

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>.

¹⁶ DP&L Notice of Filing Proposed Tariffs at 1.

of tariffs that incorporate the Commission’s modifications to an ESP will be construed as the utility’s acceptance of those modifications.¹⁷ That precedent defeats DP&L’s request to withdraw its ESP 2 under R.C. 4928.143(C)(2)(a).

An ESP cannot be modified and approved by the Commission, and then accepted and implemented for almost three years prior to deciding to exercise the 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 Commission precedent 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: “the clear purpose of R.C. 4928.143(C)(2)(a) [is] to allow a utility to withdraw its proposed ESP if it dislikes the commission’s modifications.”¹⁸ 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 and, by necessity, is precluded from implementing tariffs from its ESP 1.

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,¹⁹ 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.

¹⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 99 (Mar. 31, 2016); *In the Matter of the Application of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, et al., Opinion and Order at 106 (March 31, 2016).

¹⁸ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 30.

¹⁹ *Id.* at ¶ 30 (citing R.C. 1.47(C)).

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.²⁰ Further, the Commission has no authority to act beyond its statutory powers.²¹ 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. Therefore, the withdrawal right under R.C. 4928.143(C)(2)(a) is not triggered by the Court's actions, DP&L has no right to withdraw its application almost three years after it was accepted and implemented, and DP&L has no right to implement its proposed tariffs.

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 its proposed tariffs violate R.C. 4928.143(C)(2)(b). 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 through its proposed tariff filings. But that is exactly what DP&L is requesting to do with its proposed tariffs.

²⁰ *In re Application of E. Ohio Gas Co.*, 141 Ohio St.3d 336, 2014-Ohio-3073, ¶ 28.

²¹ *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).

Perhaps recognizing the impossibility of reverting to its ESP 1 framework and abandoning 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.”²² 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 (D1-D39), transmission (T1-T9), and generation (G1-G9, G20-G23, G26-G28) 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.²³ 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 2.²⁴ 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 1.²⁵

While it may be understandable that DP&L would want to continue the SSO auction process for generation pricing that has been established and implemented for years, 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 abandons its current SSO auction process and pricing and other provisions embedded in its ESP 2. DP&L

²² R.C. 4928.143(C)(2)(b).

²³ DP&L Notice of Filing Proposed Tariffs at 2, Case No. 08-1094-EL-SSO, et al. (August 1, 2016).

²⁴ *Id.*

²⁵ *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).

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 implement its proposed tariffs, which blend two separate ESPs together, plainly violates R.C. 4928.143(C)(2)(b).

Other flaws in DP&L's proposal involve its request to continue its nonbypassable Transmission Cost Recovery Rider (TCRR-N),²⁶ its Reconciliation Rider,²⁷ and its Storm Cost Recovery Rider,²⁸ none of which arose from its ESP 1.

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."²⁹ This description 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."³⁰ 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 Commission's authorization of DP&L's SSR has been declared unlawful, implementation of the RSC would similarly allow DP&L to collect the equivalent of unlawful transition revenue. This conclusion was reinforced

²⁶ See P.U.C.O. No. 17, Eleventh Revised Sheet No. T8.

²⁷ See P.U.C.O. No. 17, Thirteenth Revised Sheet No. D29.

²⁸ See P.U.C.O. No. 17, Fifth Revised Sheet No. D30.

²⁹ DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Fourth Revised Sheet No. G25, Page 1 of 2.

³⁰ DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Third Revised Sheet No. G29, Page 1 of 1.

by Kroger's witness' testimony from DP&L's ESP 2. During that proceeding, Kroger witness Higgins described the unlawful SSR as a "de facto extension and expansion" of the former RSC included in ESP 1.³¹ 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.

E. The Commission should immediately order DP&L to eliminate the SSR and stop collecting SSR charges from customers.

Moreover, even though DP&L is proposing to eliminate the SSR in its proposed tariff filings, the fact remains that DP&L has not yet eliminated the unlawful charge as ordered by the Court and customers still continue to suffer from the imposition of this charge. The Commission has also yet to issue an order directing that DP&L eliminate the unlawful charge to carry out the effects of the Court's decision which reversed the authorization of the SSR. It is of paramount importance that the Commission act expeditiously to vacate the SSR so as to prevent any further collection of unlawful transition revenue or its equivalent from customers and to prevent further injury to customers.

III. Conclusion.

For the reasons set forth above, the Commission should deny DP&L's request to implement the proposed tariffs and the Commission should immediately order DP&L to eliminate the SSR and stop collecting SSR charges from customers.

³¹ 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.

Respectfully submitted,

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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 12, 2016.

/s/ Ryan P. O'Rourke

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Summary: Comments THE KROGER COMPANY'S COMMENTS ON THE DAYTON POWER AND LIGHT COMPANY'S PROPOSED TARIFFS electronically filed by Ms. Cheryl A Smith on behalf of The Kroger Co.