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. 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 Pursuant to Ohio Rev. Code §4905.13.	:	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	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

REPLY OF THE DAYTON POWER AND LIGHT COMPANY IN SUPPORT OF MOTION TO WITHDRAW ESP II APPLICATION AND MOTION TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES

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I. INTRODUCTION

The Supreme Court of Ohio described the process that the Commission must follow after a remand from the Court:

> "the statutes [of Title 49] make clear [1] that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; [2] that the schedule remains in effect until replaced by a further order of the commission; [3] that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and [4] that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."

Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 116-17, 346 N.E.2d 778 (1976) (emphasis added). The Court also explained that its "task is not to set rates; it is only to assure that the rates are not unlawful and unreasonable, and that the rate-making process itself is lawfully carried out." Id. at 108.

Consistent with those requirements, and in response to the Supreme Court of Ohio's decision in In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490 (Sup. Ct. Ohio June 20, 2016), The Dayton Power and Light Company ("DP&L") has moved to withdraw its Electric Security Plan ("ESP") application in Case No. 12-426-EL-SSO, et al., and to implement rates that are consistent with the rates that were in effect before the Commission's September 4, 2013 Opinion and Order in that case ("2013 Rates").[1] The 2013 Rates that DP&L seeks to have implemented would be in effect for only a limited time

[1] July 27, 2016 Motion of The Dayton Power and Light Company to Withdraw Its Applications in This Matter (Case No. 12-426-EL-SSO, et al.); July 27, 2016 Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates (Case No. 08-1094-EL-SSO, et al.), July 27, 2016; Motion of The Dayton Power and Light Company to Implement Previously Authorized Rates (Case No. 12-426-EL-SSO, et al.).

-- DP&L's third ESP case (Case No. 16-395-EL-SSO) is pending before the Commission, and is set for hearing on October 25, 2016. The 2013 Rates that DP&L asks the Commission to implement would be in effect only until that case is decided.

As DP&L demonstrated in its Motion to Implement Previously-Authorized Rates, and as further demonstrated below, Ohio Rev. Code §§ 4928.143(C)(2), 4928.141(A) and 4905.32 establish that the Commission is required to implement DP&L's 2013 Rates in response to the Supreme Court's mandate. The Commission should thus implement the rates included in DP&L's August 1, 2016 tariff filing in Case No. 08-1094-EL-SSO.

Various intervenors argue that the Commission should not approve DP&L's request to implement the Rate Stability Charge ("RSC") that was included in DP&L's 2013 Rates. As demonstrated below, the Commission should reject those arguments because (1) the Commission is required by Ohio Rev. Code §§ 4928.143(C)(2), 4928.141(A) and 4905.32 to implement the 2013 Rates; (2) no party sought rehearing of the Commission's Order approving the RSC and the doctrine of res judicata bars them from now challenging the 2013 Rates; and (3) the RSC is not unlawful.

In addition, in ruling on DP&L's pending motions, it is important that the Commission recall its factual findings in the 12-426-EL-SSO case that DP&L needed a stability charge so that it could provide stable distribution, transmission and generation service:

> "the Commission believes that [a stability charge] would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service . . . . Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separate utility; thus, the financial losses in the

> generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that [a stability charge] will provide stable revenue to DP&L for the purpose of maintaining its financial integrity."

Sept. 4, 2013 Opinion and Order, pp. 21-22) (Case No. 12-426-EL-SSO) (emphasis added). DP&L's need for a stability charge to allow it to provide safe, stable and reliable distribution, transmission and generation service has not changed.

Some of the Intevenors have argued that DP&L should just keep its ESP II rate and eliminate the charge for the SSR. Not only is that request inconsistent with the Supreme Court's Order (overturning ESP II in its entirety), but also, doing so would make it very difficult for DP&L to continue to provide safe and reliable electric service. Indeed, recent actions by credit rating agencies show the possible adverse effects if DP&L does not receive appropriate rate relief. Specifically, on June 27, 2016, S&P Global Ratings ("S&P") placed its ratings for DP&L on CreditWatch with negative implications. S&P stated that the Supreme Court's decision "increases the likelihood of a weaker financial risk profile, reflecting weaker financial measures for DPL and DP&L that could result in a near term ratings downgrade." Id. at 2. S&P further stated that it would "resolve the CreditWatch listing depending on the responses of the PUCO and the company to the Ohio Supreme Court's reversal." Id. at 3. Similarly, on July 12, 2016, FitchRatings ("Fitch") revised the Rating Outlook for DP&L and DPL Inc. from stable to negative. Fitch explained that "[t]he resolution of the Negative Outlook will depend upon the amount, sustainability and timeliness of alternative regulatory rate relief from PUCO, as well as the companies' ability to refinance or repay the 2016 maturities in a timely manner with reasonable terms." Id. at 1 (emphasis added). The agency "continues to believe that the PUCO

will ultimately authorize an alternative rider for DP&L to mitigate the Ohio Supreme Court ruling. However, the path and timing to that end are primary credit concerns." Id.

The Commission should thus grant DP&L's motions so that it can continue to provide safe, stable and reliable distribution, transmission and generation service.

II. THE COMMISSION MUST IMPLEMENT 2013 RATES

A. OHIO REV. CODE § 4928.143(C)(2) IMPOSES NO TIME LIMIT ON DP&L'S RIGHT TO WITHDRAW ITS ESP APPLICATION

Several intervenors argue that DP&L has no right to withdraw its ESP II application because the withdrawal was not in response to a Commission order (IEU, pp. 4-5; Kroger, p. 7; OCC, pp. 5-6; OEG, p. 3; OMA, p. 3; OPAE, p. 2); DP&L has accepted the benefits of the ESP (OCC, p. 4; OEG, p. 3; IEU, p. 5; Kroger, p. 7; OMA, p. 2); and it is too late (Kroger, pp. 6-7; RESA, p. 3). These arguments are inconsistent with Ohio Rev. Code § 4928.143(C)(2), and the Supreme Court's self-described role in the ratemaking process.

Pursuant to that statute:

> "(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.
>
> (b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, 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, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively."

Ohio Rev. Code § 4928.143(C)(2) (emphasis added).

Thus, "[i]f the commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application." In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 26. The Supreme Court interprets this statute broadly to achieve that purpose. Id. at ¶ 29-30 (holding that the Commission had "nullifie[d] the clear purpose of R.C. 4928.143(C)(2)(a)" by modifying Ohio Power Company's ESP application after the ESP had expired, thus preventing the utility from withdrawing its ESP).

Some intervenors argue that DP&L can withdraw its ESP only after the Commission has modified its Order. But that already has occurred. Sept. 4, 2013 Opinion and Order, pp. 48-49 ("The Commission made numerous modifications to the proposed ESP, including denying the ST, adjusting the term of the ESP to 36 months, adjusting the proposed blending percentages, adjusting the SSR to $110 million per year effective January 1, 2014, and denying the proposed rider AER-N.") (Case No. 12-426-EL-SSO). Although DP&L seeks to withdraw its application after the Supreme Court's ruling that reversed the Commission's decision, there is no material difference whether the Commission modifies an ESP in the first instance, or after rehearing, or following reversal by the Supreme Court. In each instance, a utility may withdraw the ESP. In re Application of Ohio Power Co. at ¶ 30 ("As read by the commission, R.C. § 4928.143(C)(2)(a) applies only when the commission is deciding the fate of the ESP application. . . . This would hardly be a 'just and reasonable result.'") (quoting Ohio Rev. Code § 1.47(C)). In fact, the plain meaning of the statute is that a material change to those rates (either by the Commission or the Supreme Court of Ohio) permits the utility to withdraw the application.

In addition, some intervenors argue that DP&L cannot withdraw its ESP now that it has accepted the benefits of the ESP or that it is, alternatively, simply too late to withdraw the ESP application. For example, RESA asserts (p. 6) that "[a] more reasonable interpretation of R.C. 4928.143(C)(2)(a) is to limit a utility's unilateral withdrawal of an ESP application to a reasonable time after a Commission modification of the application." RESA, p. 3. However, the statute includes no such requirement. The Supreme Court is clear: "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words." Portage Cty. Bd. of Commrs. v. City of Akron, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52. Allowing a utility to withdraw its ESP at any time, particularly after it has been modified, serves the statute's "clear purpose" to require utilities to operate under ESPs that they are willing to accept. In re Application of Ohio Power Co., 2015-Ohio-2056, at ¶ 30. Alternatively, because the Supreme Court of Ohio overturned the entire ESP II Order, (infra, Section II(B)), it is the same as if the Application is still pending prior to a PUCO decision. Like any other Application, the utility controls its request and can unilaterally withdraw its application at any time before decision.

DP&L thus has the right to withdraw its ESP application in Case No. 12-426-EL-SSO pursuant to Ohio Rev. Code § 4928.143(C)(2)(a), and the Commission must therefore implement DP&L's 2013 Rates pursuant to Ohio Rev. Code § 4928.143(C)(2)(b).

B. THE SUPREME COURT REVERSED THE DECISION OF THE COMMISSION IN ITS ENTIRETY, REQUIRING A RETURN TO RATES CONSISTENT WITH DP&L'S 2013 RATES UNTIL NEW RATES ARE SET

DP&L's motion to implement the 2013 Rates demonstrated that the Supreme Court had reversed the Commission's order in Case No. 12-426-EL-SSO in toto, and that

pursuant to Ohio Rev. Code §§ 4928.141(A) and 4905.32, the Commission must implement DP&L's 2013 Rates that were established in Case No. 08-1094-EL-SSO. Various intervenors argue (IEU, p. 8; Kroger, p. 2; OEG, p. 3; OMA, pp. 4-6) that the Supreme Court did not reverse the Commission's decision in its entirety, but rather modified it by (1) removing only the SSR, and (2) leaving the rest of the Commission's decision intact. That interpretation is inconsistent with the Court's opinion and Ohio law.

The Supreme Court's ruling was "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 ___." In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Opinion No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016) (emphasis added). The Court could have reversed-in-part or modified the Commission's decision, but did not. Ohio Rev. Code § 4903.13. It also could have identified a portion of the decision that it found "unlawful or unreasonable," but did not. Id. Nor did the Court remand the action back to the Commission for further consideration, further demonstrating the full overturning of ESP II. Instead, the Court simply reversed the Commission's decision in toto.

The intervenors' assertion that the only issue before the Court was the legality of the SSR is false. On the contrary, several other errors were raised.[2] It would be unreasonable for the Commission to assume or to speculate (as intervenors do) that the Court reversed the

[2] There were assignments of error that were not related to the SSR. For instance, OCC argued that the Commission's Sept. 6, 2013 Entry Nunc Pro Tunc was unlawful, and that the Commission "unreasonably and unlawfully erred in granting DP&L's request for rehearing of the PUCO's March 19, 2014 Second Rehearing Entry." Sept. 22, 2014 Second Notice of Appeal by The Office of the Ohio Consumers' Counsel, p. 4. IEU further argued that DP&L's ESP was not more favorable in the aggregate than a market rate offer. Aug. 29, 2014 Notice of Appeal of Appellant Industrial Energy Users-Ohio, pp. 4-5. Finally, DP&L argued that the Commission erred in accelerating its original deadline for DP&L to divest its generation assets. Sept. 19, 2014 Notice of Cross-Appeal of The Dayton Power and Light Company, p. 3.

Commission's decision insofar as it authorized the SSR, but otherwise affirmed it while those various issues were pending.

Some Intervenors went so far as to read additional words into the Supreme Court's Order that it "order[ed] rates customers pay to DP&L to be reduced through December 31, 2016." OCC, pp. 3-4. The Court never instructed the Commission merely to excise the SSR from DP&L's tariff sheets and certainly did not order rates to be lower. Indeed, doing so would be contrary to the Court's longstanding reluctance to involve itself with such detail in the ratemaking process. City of Dayton v. Pub. Util. Comm., 174 Ohio St. 160, 162, 187 N.E.2d 150 (1962) (per curiam) ("The members of this court are neither accountants nor engineers, and manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult question of the reasonableness of the order than is the commission."), modified on rehearing on other grounds, 174 Ohio St. 604, 190 N.E.2d 913 (1963). Accord: Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 108, 346 N.E.2d 778 (1976) (holding that the Court's "task is not to set rates; it is only to assure that the rates are not unlawful and unreasonable, and that the rate-making process itself is lawfully carried out").

Instead, the Court ruled that – in light of In re Application of Columbus S. Power Co. – the Commission's decision modifying and approving DP&L's ESP is reversed. In re Application of Dayton Power and Light Co., at ¶ 1. The Commission now must issue an "appropriate order" that "replaces the reversed order." Cleveland Elec., at 117. This result, which leaves to the Commission the specifics of executing the mandate, is consistent with Court's jurisdiction, which is limited by law to "final orders" of the Commission. Ohio Constitution Article IV, Section 2(d) (granting the Court "[s]uch revisory jurisdiction of the

proceedings of administrative officers or agencies as may be conferred by law"); Ohio Rev. Code § 4903.13 ("A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."). Accord: Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment").

Contrary to RESA's assertion (p. 9), an "appropriate order" should reflect the standard service offer rates that were in place before the Commission's September 4, 2013 Opinion and Order. Pursuant to Ohio Rev. Code § 4928.141(A): "Only a standard service offer authorized in accordance with § 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section." Similarly, Section 4905.32 states: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." As the Supreme Court of Ohio reversed in toto the Commission's September 4, 2013 Opinion and Order, those sections establish that the Commission must implement the immediately-prior standard service offer that the Commission authorized for DP&L, which was from DP&L's first ESP case, Case No. 08-1094-EL-SSO. Rates that are consistent with DP&L's 2013 Rates therefore must be put back into effect until Commission approval of a new standard service offer.

III. THE RATE STABILIZATION CHARGE IS NOT A TRANSITION CHARGE

OCC (p. 3), OMA (pp. 6-7), Kroger (pp. 9-10) and OPAE (p. 5) argue that the Rate Stabilization Charge ("RSC") that the Commission approved in its June 24, 2009 Opinion and Order in Case No. 08-1094-EL-SSO is a transition charge, and is not lawful. The Commission should reject that argument for three separate and independent reasons: (a) Ohio statutes require the Commission to implement the 2013 Rates; (b) no party sought rehearing of the Commission's Order in Case No. 08-1094-EL-SSO and those parties are barred by res judicata from re-litigating the rates established in that case; and (c) in any event, the RSC is not an unlawful transition charge.

A. OHIO LAW REQUIRES THE COMMISSION TO IMPLEMENT THE 2013 RATES

As demonstrated in the prior section, the Commission must implement 2013 Rates, pursuant to Ohio Rev. Code §§ 4928.143(C)(2)(b), 4928.141(A) and 4905.32. Since it is undisputed that the RSC was included in DP&L's 2013 Rates, the Commission must approve the RSC. Ohio law also requires that DP&L must have an ESP in place and ESP I was already approved and not appealed; thus, it is the appropriate ESP to implement now that ESP II has been fully overturned. Ohio Rev. Code § 4928.141(A). In fact, the Commission previously extended ESP I during the pendency of ESP II. Dec. 19, 2012 Entry, p. 4 (Case No. 12-426-EL-SSO).

B. NO PARTY SOUGHT REHEARING OF THE COMMISSION'S ORDER IN CASE NO. 08-1094-EL-SSO

On February 24, 2009, DP&L filed a Stipulation and Recommendation with the Commission in Case No. 08-1094-EL-SSO. That Stipulation was signed by five of the parties

that oppose DP&L's Motion to Implement Previously Authorized Rates -- namely, OCC, IEU, OMA, Kroger, and OPAE.[3] Constellation NewEnergy -- a member of RESA,[4] which also opposes DP&L's motion -- also signed the Stipulation in the 08-1094-EL-SSO case. Id.

Significantly, no party to the 08-1094-EL-SSO case sought rehearing of the Commission decision approving that Stipulation, and no party appealed that decision. It is well settled in Ohio that a party cannot challenge a decision if it did not seek rehearing of that decision. Ohio Rev. Code § 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

The intervenors are also barred from challenging the lawfulness of 2013 Rates by the doctrine of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St. 3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id. (internal citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action

[3] February 9, 2009 Stipulation and Recommendation, pp. 21-22 (Case No. 08-1094-EL-SSO).

[4] www.RESAUSA.org/members

between the same parties or their privies. Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (internal citation omitted). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (internal quotation marks and citation omitted). Accord: Natl. Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.") (internal quotation marks, citation and emphasis omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St. 2d 241, 246, 431 N.E.2d 672 (1982).

The Commission has held that the principles of res judicata and collateral estoppel apply in Commission proceedings. Aug. 24, 2005 Entry, pp. 3-4 (Case No. 05-886-EL-CSS) ("The Ohio Supreme Court has confirmed that 'where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.'") (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus); Feb. 13, 2014 Opinion and Order, p. 36 (Case No. 12-2400-EL-UNC) ("There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral estoppel applies to administrative proceedings before the Commission."); Dec. 2, 2015 Entry, p. 3 (Case No. 15-796-TR-CVF) ("The Commission finds that Quality Carriers is precluded from

raising the same issues in this proceeding that were previously decided in Quality Carriers 1 under the doctrines of res judicata and collateral estoppel.").

The intervenors here had the opportunity to challenge the lawfulness of the RSC in Case No. 08-1094-EL-SSO, but failed to do so. Indeed, many of them signed the Stipulation implementing the RSC. They are thus barred by res judicata from challenging the RSC.

C. THE RSC IS NOT A TRANSITION CHARGE

The PUCO found that the RSC was not a transition charge. Dec. 19, 2012 Entry, p. 4 (Case No. 12-426-EL-SSO). Moreover, in the AEP case, the Supreme Court of Ohio held that AEP-Ohio's RSR was a lawful stability charge under Ohio Rev. Code § 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 a portion of AEP's RSR was a transition charge and was barred by Ohio Rev. Code § 4928.38. Id. at ¶ 14-40.

As shown below, AEP 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. The Commission should thus consider those issues now, and conclude that a stability charge under Ohio Rev. Code § 4928.143(B)(2)(d) is not an unlawful transition charge.

1. A Stability Charge Is Lawful "Notwithstanding Any Other Provision of Title [49]"

Section 4928.143(B)(2)(d) 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:
>
> * * *
>
> (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 Ohio Rev. Code § 4928.143(B) establishes that a stability charge like the RSC is lawful even if it were 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 RSC would thus be lawful even if it was a transition charge.

The Supreme Court interprets "notwithstanding" clauses broadly, holding that they "indicate[] the General Assembly's intention" that a given provision "take[s] precedence over any contrary statute purporting to limit" that provision. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35 (emphasis added). Accord: Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.") (emphasis added).

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. The Commission may thus consider the "notwithstanding" clause issue in this proceeding, and should conclude that the clause establishes that a stability charge authorized by Ohio Rev. Code § 4928.143(B)(2)(d) is not barred by the transition cost sections.

2. Section 4928.143(B)(2)(D) Is the Later-Enacted Statute

There is a separate and independent reason that the RSC does not violate the prohibition (passed in 1999) in Ohio Rev. Code § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the RSC is lawful under § 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. Ohio Rev. Code § 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.").

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 first two paragraphs of this section because the term "transition cost" is defined by statute, and the RSC 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). Ohio Rev. Code § 4928.39(A) ("The costs were prudently incurred.") (emphasis added); Ohio Rev. Code § 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, the RSC was set at an amount to allow DP&L to provide stable retail electric service in the future. June 24, 2009 Opinion and Order, pp. 8-9 (Case No. 08-1094-EL-SSO) (rejecting challenge to RSC and stating that the Stipulation promotes "rate certainty."). Therefore, the RSC does not recover "transition costs," as defined by statute, since the RSC is forward-looking.

In its decision in the AEP Case, the Supreme Court held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by § 4928.38. In re Application of Columbus S. Power Co., at ¶ 25. As demonstrated in the first two paragraphs of this section, the statutory bar against recovering the "equivalent" of transition costs in § 4928.38 does not bar DP&L's recovery of the RSC, because § 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

RSC is designed to allow DP&L to provide rate certainty in the future, 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" (a term defined to include 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 RSC 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 RSC 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 in the AEP case and, therefore, were not considered by the Supreme Court. The Commission should thus consider them now.

IV. DP&L'S PROPOSAL TO MAINTAIN ASPECTS OF ITS ESP II CASE MIMIMIZES CUSTOMER AND MARKET IMPACTS

Various intervenors -- OMA (pp. 7-8), Kroger (pp. 8-9) and IEU (p. 8) -- argue that DP&L should not be permitted to implement portions of the Commission's order from ESP I

and other portions of the Commission's order from ESP II. For example, Kroger (p. 3) asserts that DP&L has "cherry-pick[ed] a suite of provisions that it finds most favorable." Other intervenors make similar arguments. As demonstrated below, those arguments ignore several key points: (1) competitive bidding has occurred in DP&L's service territory, and parties have entered into contracts in reliance upon that process; (2) several riders are not impacted by the orders from ESP II (e.g., Universal Service, Energy Efficiency Rider, Alternative Energy Rider); and (3) DP&L's rates would actually be significantly higher if new rates were implemented exactly how they existed in 2013.

Specifically, there was no competitive bidding in place in 2013. In 2013, DP&L's Standard Service Offer was provided by DP&L and the rates were set equal to DP&L's then-existing generation rates, with certain modifications for fuel costs. Feb. 24, 2009 Stipulation and Recommendation, p. 3, ¶¶ 1-2 (Case No. 08-1094-EL-SSO).

In its Order approving DP&L's ESP application in Case No. 12-426-EL-SSO, the Commission required that DP&L's SSO rates be set through a competitive bidding process. Sept. 4, 2013 Opinion and Order, pp. 15-17 (Case No. 12-426-EL-SSO). As the Commission knows, various rounds of competitive bidding have occurred, all of which are set to expire in May 2017.

In its Notice of Filing Proposed Tariffs, DP&L stated that it "will honor existing contracts with winning competitive bid suppliers through the end of their term (May 2017) and maintain current PJM obligations for all suppliers" and that its proposed tariffs "will reflect the Competitive Bid rate in order to minimize rate impacts to customers." Aug. 1, 2016 The Dayton Power and Light Company's Notice of Filing Proposed Tariffs, p. 2 (Case No. 08-1094-EL-SSO,

et al.). DP&L's Tariffs for Standard Offer Generation, G10-G18, thus reflect the results of the most recent competitive bidding process. Id.

Various intervenors agree that the results of the competitive bidding process should be honored. For example, OCC (pp. 6-7) has asserted that "DP&L has procured power for standard service through May 31, 2017 by way of auctions held much earlier. Those auctions cannot be undone." Similarly, RESA (p. 11) asserts that implementation of new rates should not "negatively interfere with existing customer contracts, existing prices and customer relationships." By proposing to maintain the results of the competitive bidding in Case No. 12-426-EL-SSO, as well as the same PJM line item responsibilities for all suppliers, DP&L has taken steps to maintain the integrity of the market.

Although some intervenors argue that rates should be put in place exactly as they were in 2013, they ignore the point that those rates were significantly higher than those in in effect today and those proposed by DP&L. The combination of riders that made up the SSO generation rates from the 08-1094-EL-SSO case were significantly higher than the competitive bidding rates from the 12-426-EL-SSO case. In addition, several other riders (i.e., Universal Service, Energy Efficiency Rider, Alternative Energy Rider) that are not affected by the order in ESP II were also much higher in 2013 than today. Those riders also have regularly scheduled true-ups, so it would be illogical to revert to higher 2013 rates. The Commission should thus reject the intervenors' arguments that the Commission should implement 2013 Rates exactly as they existed in 2013 before the Commission's Order granting DP&L's application in Case No. 12-426-EL-SSO, because doing so would disrupt the competitive market and related contracts, and actually result in rates that are significantly higher than those proposed by DP&L.

Thus, contrary to intervenors' claims, DP&L did not "cherry-pick" those provisions that it found "most favorable." By proposing to maintain the results of the competitive bidding from the 12-426-EL-SSO case as the generation rate and keeping in place the current rates for the various true-up riders, DP&L is proposing both to minimize the impact on the competitive market and to maintain the customer benefits established in ESP II during this interim period.

IEU (p. 8 and p. 11 n.5) asserts that DP&L's nonbypassable transmission charge that was authorized in the 12-426-EL-SSO case should be rejected. IEU ignores the fact that existing CRES contracts, existing SSO auction-winning bids and related Master SSO Supply Agreements are all premised upon the TCRR-N/TCRR-B structure that is in place today. Those contracts and winning bids assume that transmission costs would be incurred by DP&L and recovered by DP&L through the TCRR-N. DP&L thus proposed to maintain that structure to maintain stability in the market. Indeed, in August 12, 2016 comments filed in response to DP&L's proposed tariffs, IGS stated: "Authorization of a bypassable transmission rider for any period of time would reek [sic] havoc on the retail electric service market and have the potential to open the floodgates to collateral litigation." Aug. 12, 2016 Comments of Interstate Gas Supply, Inc., p. 5 (Case No. 08-1094-EL-SSO). A substantial change to the TCRR-N structure would require ample lead time in order for competitive suppliers in DP&L's territory to be able to make the required adjustments to existing and new contracts. Further, IEU's request regarding bypassable transmission is already pending in DP&L's ESP III case, and given the temporary nature of implementing 2013 rates, is more appropriately addressed there.

Kroger's argument (p. 8) regarding DP&L's distribution and transmission tariffs remaining the same misses the point. As discussed above, DP&L proposes to maintain its

current transmission tariffs in order to maintain stability in the market. Many of DP&L's current distribution tariffs were approved in ESP I and continued in ESP II. The two new distribution tariffs approved in ESP II (Reconciliation Rider – Nonbypassable and Storm Cost Recovery Rider) are already set to zero and require an application to the Commission to implement future rates. The reversal by the Supreme Court of Ohio of the Commission's Order in Case No. 12-426-EL-SSO should affect only the generation rates that were approved by the Commission pursuant to Ohio Rev. Code § 4928.143 and ESP II. DP&L's current transmission and distribution rates should remain as they are today.[5]

V. REQUIRING DP&L TO REFUND THE SSR WOULD BE CONTRARY TO OHIO LAW

OEG's request (p. 5) for an order requiring DP&L to refund amounts collected under the SSR 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).

[5] DP&L's motion in this case would not change DP&L's distribution or transmission rates. DP&L does seek an increase to its distribution rates in Case No. 15-1830-EL-AIR.

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. 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).

OEG (p. 5 & n.18) claims that the Supreme Court of Ohio's ruling in In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip. Op. 2016-Ohio-1608, ¶ 40 (Sup. Ct. Ohio Apr. 21, 2016) ordered a "refund to customers." The Commission should reject that argument for two separate and independent reasons.

First, the principle that collected rates are not subject to refund is often cited and has been the law in Ohio since at least 1957. Keco, 166 Ohio St. 254. The Court did not overrule that precedent in its AEP decision -- indeed, if it intended to do so, it would have done so expressly.

Second, OEG's characterization of what happened in that case is not accurate. Specifically, the Court concluded that AEP was collecting two types of costs through the RSR:

1. Deferral: The Court explained that AEP's Commission-approved costs of providing capacity were $188.88 per megawatt day. In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 28. The Commission authorized AEP to charge CRES providers the PJM auction prices, and to defer and recover from customers the difference between the two rates through the RSR. Id. at ¶ 29.

2. Nondeferral: The Court also concluded that AEP was recovering an additional $508 million under the RSR that included capacity costs: "Yet despite the fact that the commission authorized AEP to recover its actual capacity costs, the commission also allowed AEP to recover $508 million in additional revenue through the RSR during the ESP period, the amount of which appears to be tied in large part to AEP's recovery of CRES capacity charges." Id. at ¶ 34.

The Court thus concluded that AEP was recovering the same capacity costs twice -- once though the deferral portion of the RSR and once through the nondeferral portion. Id. ("Thus, the commission awarded AEP additional capacity revenues through the nondeferral

portion of the RSR, even though it had found that AEP would fully recover its incurred CRES capacity costs at a rate of $188.88 per megawatt-day. Accordingly, we find that the company is being overcompensated for providing capacity service through the nondeferral part of the RSR.") Id. To eliminate the double recovery of capacity costs, the Court ordered AEP to eliminate from the deferral of capacity costs any capacity costs that were already recovered through the nondeferral portion of the RSR. Id. at ¶ 40 ("Because AEP is entitled to recover only its actual capacity costs, we order the commission to adjust the balance of its deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP.").

Thus, contrary to OEG's claim, the Court did not order AEP to refund any amounts that it had already collected. Instead, consistent with past precedent,[6] the Court concluded that AEP had already collected a portion of its capacity costs from the nondeferral portion of the RSR, and that AEP was not entitled to recover those same costs a second time. Id.[7]

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[6] In the Matter of the Complaint of Dominion Retail, Inc., et al., Case No. 03-2405-EL-CSS (Feb. 2, 2005 Opinion and Order), p. 14 (stating that the Commission would "closely analyze the nature of the costs sought to be recovered," and to the extent those costs were recovered in a separate rider, double "recovery will be denied"); In the Matter of the Application of Columbus S. Power Co. to Adjust Its Power Acquisition Rider Pursuant to Its Post-Market Development Period Rate Stabilization Plan, Case No. 07-333-El-UNC (June 27, 2007 Finding and Order), p. 10 n.2 (stating that a utility "should work with the Commission staff to identify and eliminate any double recovery"); In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Cleveland Elec. Illum. Co. and Related Matters, et al., Case Nos. 93-08-EL-EFC and 93-07-EL-EFC, 1994 Ohio PUC LEXIS 912, at *39 (Aug. 10, 1994 Supplemental Opinion and Order) (detailing measure to prevent "double recovery" of expenses).

[7] RESA (pp. 11-12) makes two arguments that are not at issue now and should not be resolved. First, RESA argues that the Commission should maintain its order for the 12-426-EL-SSO case that DP&L separate its generation assets by January 1, 2017. However, given the pendency of DP&L's ESP III case (Case No. 16-395-EL-SSO) and the related rating agency action discussed in the Introduction to this Reply, this motion to implement rates is not the place to address generation separation. Second, RESA asks for additional competitive bidding if "a subsequent SSO is not authorized by April 1, 2017." Future competitive bidding should be addressed in DP&L's pending ESP III case.

VI. CONCLUSION

The Commission should approve the implementation of 2013 Rates pursuant to Ohio Rev. Code §§ 4928.143(C)(2), 4928.141(A) and 4905.32. The Commission should reject the intervenors' arguments that the RSC is a transition charge, not only because the Commission must implement 2013 Rates pursuant to those sections, but also because (1) the 2013 Rates were implemented by a Stipulation that many of the intervenors signed, and for which no party sought rehearing; and (2) the RSC is not an unlawful transition charge in any event pursuant to the "notwithstanding" clause in § 4928.143(B)(2).

The Commission should reject the intervenors' arguments that rates should be implemented exactly as they existed in 2013, as doing so would disrupt the market, existing supplier and customer contracts, and would actually lead to higher rates. Finally, the Commission should not order DP&L to refund amounts that were collected under the SSR.

Respectfully submitted,

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