

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. 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
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

FINDING AND ORDER

Entered in the Journal on August 26, 2016

I. SUMMARY

{¶ 1} Based upon the opinion of the Supreme Court of Ohio reversing the Commission's Opinion and Order in this case, the Commission modifies The Dayton Power and Light Company's electric security plan. Further, the Commission grants the motion filed by The Dayton Power and Light Company to withdraw its application for an electric security plan and finds that this case should be dismissed.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} By Opinion and Order (Order) issued on June 24, 2009, in Case No. 08-1094-EL-SSO, the Commission approved a stipulation and recommendation to establish DP&L's first ESP (ESP I). *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al., (ESP I case), Opinion and Order (June 24, 2009).

{¶ 5} Thereafter, by Order issued on September 4, 2013, in this case, the Commission modified and approved DP&L's application for a second ESP (ESP II). Included in ESP II was a service stability rider (SSR) for DP&L's financial integrity. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (ESP II case), Opinion and Order (Sept. 4, 2013).

{¶ 6} On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. Subsequently, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order.

{¶ 7} Thereafter, on July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for an ESP in this matter. On August 11, 2016, memoranda contra the motion to withdraw its application for an ESP were filed by the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE Edgemont), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA).

In their memoranda contra, some parties combined arguments regarding DP&L's proposed tariffs to implement *ESP I* with arguments regarding DP&L's motion to withdraw *ESP II*. In this case, the Commission is only considering DP&L's motion to withdraw *ESP II*. Any arguments regarding DP&L's proposal to implement *ESP I* will be considered by the Commission in the *ESP I* case. On August 18, 2016, DP&L filed its reply to the memoranda contra regarding its motion to withdraw *ESP II*.

III. ARGUMENTS BY THE PARTIES

{¶ 8} Pursuant to R.C. 4928.143(C)(2)(a), "[i]f the Commission modifies and approves an application [for an electric security plan], 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." DP&L filed a motion to withdraw its application for an ESP, thereby terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a), arguing the Commission modified and approved *ESP II* when it authorized the ESP on September 4, 2013. Contemporaneous with its motion to withdraw *ESP II*, DP&L also filed a motion pursuant to R.C. 4928.143(C)(2)(b) to implement *ESP I*.

{¶ 9} DP&L asserts that even if it did not file a motion to withdraw *ESP II*, the Supreme Court of Ohio reversed *ESP II* in total, which effectively terminates its application for an ESP in this case. According to DP&L, the Supreme Court of Ohio reversed all aspects of *ESP II*. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. Therefore, the Commission should grant its motion to withdraw *ESP II*, thereby terminating it, and issue an order implementing *ESP I*. DP&L avers that continuing *ESP II* without the SSR would be inconsistent with the Supreme Court of Ohio's opinion and would make it very difficult for DP&L to continue to provide safe and reliable electric service. DP&L notes that recent actions by credit agencies demonstrate the possible adverse effects if DP&L does not receive adequate rate relief. DP&L argues that R.C. 4928.143(C)(2)(a) imposes no time limit on its right to withdraw an application for an ESP and, therefore, the Commission should grant its motion.

{¶ 10} OMAEG, Kroger, OCC, IEU-Ohio, OP&E Edgemont, OEG, and RESA argue that the Supreme Court of Ohio reversed just the SSR and not the entire *ESP II*. They assert the Supreme Court of Ohio's opinion reversed *ESP II* on the authority of *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d---, which means the scope of the Court's decision is limited by the Court's findings in *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d. The Supreme Court of Ohio found that financial integrity charges provide utilities with the equivalent of transition revenue in violation of R.C. 4928.38. Accordingly, the parties assert that the Commission should require *ESP II* to continue without the SSR.

{¶ 11} Additionally, OMAEG, Kroger, OCC, IEU-Ohio, OP&E Edgemont, OEG, and RESA argue that R.C. 4928.143(C)(2)(a) does not provide DP&L with authority to withdraw *ESP II* because the Commission did not modify *ESP II*, the Supreme Court of Ohio did. Therefore, under the plain language of the statute, DP&L cannot withdraw *ESP II*. Further, the parties argue it would be an unreasonable reading of the statute to find that it provides DP&L with an everlasting right to withdraw an ESP that was modified and approved by the Commission. The parties assert that a reasonable reading of R.C. 4928.143(C)(2)(a) is that the electric utility may withdraw a modified ESP within a reasonable period of time, or only while the ESP is pending prior to the approval of final tariffs. They argue it would be unreasonable in this case to allow DP&L to terminate *ESP II* after being effective for nearly three years.

IV. COMMISSION CONCLUSION

{¶ 12} The Commission finds that *ESP II* should be modified to remove the SSR, based upon the opinion of the Supreme Court of Ohio reversing the Commission's Order in this case. On June 20, 2016, the Supreme Court of Ohio reversed the Order of the Commission approving *ESP II*. Thereafter, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. It is well established that, when the Supreme Court of Ohio reverses and

remands an order of the Commission, the reversal is not self-executing and the Commission must modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172. Accordingly, pursuant to the Court's reversal of our decision modifying and approving DP&L's proposed *ESP II*, the Commission hereby modifies its order authorizing *ESP II* in order to eliminate the SSR.

{¶ 13} Further, the Supreme Court of Ohio has established that when the Commission modifies an order approving an ESP, it effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. R.C. 4928.143(C)(2)(a) provides that "[i]f the Commission modifies and approves an application [for an ESP], 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." On July 26, 2016, DP&L filed a motion to withdraw its application for an ESP, terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 14} The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to grant DP&L's motion and accept the withdrawal of *ESP II*. The Supreme Court of Ohio has held that "[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 at ¶24-30. DP&L filed its motion to withdraw *ESP II* after the Court issued its opinion in apparent anticipation that the Commission would modify its order or issue a new order. As noted above, the Court has held that "[p]ublic utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that the schedule remains in effect until replaced by a further order of the commission; 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 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. Illuminating Co.*, 46 Ohio St.2d at 116-117.

{¶ 15} In conclusion, the Commission grants DP&L's motion to withdraw its application for an ESP, thereby terminating *ESP II*. Accordingly, the Commission finds that this case should be dismissed.

V. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That DP&L's motion to withdraw its application for an ESP, thereby terminating it, be granted. It is, further,

{¶ 18} ORDERED, That this case be dismissed. It is, further,

{¶ 19} ORDERED, That a copy of this Finding and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

GAP/BAM/sc

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Barcy F. McNeal
Secretary

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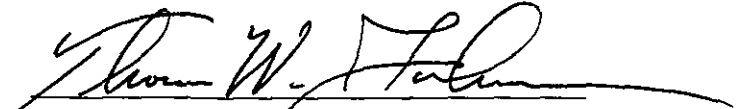
CASE NO. 12-672-EL-RDR

CONCURRING OPINION OF COMMISSIONER THOMAS W. JOHNSON

{¶ 1} The Commission's decision reaches the appropriate outcome in today's ruling, and does so in a manner that is well reasoned. I concur with its outcome. R.C. 4928.143(C)(2)(a)'s assertion that "[i]f the commission *modifies and approves* an application" for an ESP, the EDU "may withdraw the application, thereby terminating it" (emphasis added) has been the subject of many different interpretations by multiple intervenors. I merely wish to express one Commissioner's impression of this provision.

{¶ 2} While the Commission is not deciding today exactly when a modification triggers the right of an EDU to withdraw an ESP, I would like to express my belief that DP&L has had the right to withdraw their second ESP starting when it was originally

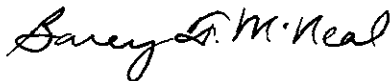
modified and approved. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. I am not opining as to when this right to withdraw terminates. I merely express an opinion that this is a right created under the statute.


Thomas W. Johnson, Commissioner

TWJ/sc

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AUG 26 2016



Barcy F. McNeal
Secretary