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

INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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f. To the extent the Commission or the Supreme Court determines that *Keco* and the cases following it do not authorize the Commission to initiate a proceeding and prospectively order that rates be adjusted to account for the amounts billed and collected under the unlawful SSR, the Commission or the Court should overrule the cases extending *Keco*. 44

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INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING

On August 26, 2016, the Public Utilities Commission of Ohio ("Commission") issued two orders that allowed The Dayton Power and Light Company ("DP&L") to withdraw from its second electric security plan ("ESP")[1] and return to select provisions, terms, and conditions of its first ESP.[2] Both of those orders are unlawful and unreasonable. In the order permitting DP&L to withdraw its ESP application, the Commission erred because DP&L cannot establish it has a right to withdraw its ESP II

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[1] *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 Nos. 12-426-EL-SSO, *et al*. ("*ESP II Case*").

[2] *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 Nos. 08-1094-EL-SSO, *et al.* ("*ESP I Case*").

application. Industrial Energy Users-Ohio ("IEU-Ohio") also demonstrated that the Commission erred in that order by not initiating a proceeding to account for amounts that DP&L collected under the unlawfully authorized Service Stability Rider ("SSR"); this demonstration is also set forth in IEU-Ohio's assignments of error in this case.

In this Application for Rehearing, IEU-Ohio seeks rehearing of the Commission's decision authorizing DP&L to selectively determine the provisions, terms, and conditions that will make up its ESP until a new ESP (or market rate offer) is authorized. Specifically, the Commission's August 26, 2016 Finding and Order ("Order") is unlawful and unreasonable in the following aspects:

1. The Commission's Order allowing DP&L to maintain the nonbypassable Transmission Cost Recovery Rider-Nonbypassable ("TCRR-N") is unlawful and unreasonable because:

    a. The Commission is required to restore the fully bypassable TCRR, which was one of the "provisions, terms, and conditions" of DP&L's prior ESP. R.C. 4928.143(C)(2)(b).

    b. The Commission is required to comply with its rules, which require transmission riders to be fully bypassable. Rule 4901:1-36-04(B), O.A.C.

    c. The authorization of the nonbypassable TCRR-N is preempted by federal law because it blocks customers from taking service directly under PJM Interconnection, LLC's ("PJM") Open Access Transmission Tariff ("OATT") and because costs are not allocated and billed in the same manner as required by PJM's OATT. U.S. Const. Article IV, Clause 2 (Supremacy Clause); 16 U.S.C. § 824(b)(1) (Federal Power Act).

2. The Commission's Order is unlawful and unreasonable because the Commission did not address IEU-Ohio's arguments that the law requires DP&L's TCRR to be fully bypassable. R.C. 4903.09.

3. The Commission's Order authorizing the Rate Stabilization Charge ("RSC") is unlawful and unreasonable because:

    a. The authorization of the RSC at a non-zero rate was not a lawful and reasonable exercise of the Commission's powers and it

conflicts with the Commission's own rationales offered in the Order. R.C. 4905.22, 4928.02; Order at 8-9; *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 38.

b. If the Commission allows the RSC to remain in effect at a non-zero rate, then the Commission must direct DP&L to modify the RSC tariff sheet to include the ability to bypass the RSC by customers that agree to return to the standard service offer ("SSO") at market-based rates. R.C. 4928.143(C)(2)(b); *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*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 40 (Mar. 18, 2009) "(*AEP ESP I Case")*.

4. The Commission's Order is unlawful and unreasonable because the Commission failed to address IEU-Ohio's arguments regarding the RSC. R.C. 4903.09.

5. The Commission's Order is unlawful and unreasonable because the Commission failed to address IEU-Ohio's arguments regarding initiating a proceeding to account for the amounts that DP&L billed and collected under the SSR and order a prospective reduction in rates. R.C. 4903.09.

6. The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful SSR and to prospectively adjust the rates of DP&L in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission's failure to initiate such a proceeding is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957) ("*Keco*"), the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio, hereinafter referred to as "Court") should overrule those decisions and direct that proceedings affording prospective rate relief be initiated.

As discussed in more detail in the attached Memorandum in Support, the Commission should grant rehearing in accordance with IEU-Ohio's arguments herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In the *ESP II Case*, the Commission authorized DP&L's SSR, among other terms and conditions. IEU-Ohio and others successfully pursued an appeal of the Commission's authorization of the SSR with the Court concluding that the charge was an unlawful transition charge.[3] Following the Court's reversal, and even before it,

[3] The Court reversed the Commission on the basis of the Court's decision overturning AEP-Ohio's Retail Stability Rider ("RSR"). *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490. The Court overturned the RSR on grounds that it was an unlawful transition charge. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 25, 38-40.

IEU-Ohio and others urged the Commission to take action to remedy the effects of DP&L's unlawful SSR charge.

While these requests were pending, DP&L sought to preserve its nonbypassable revenue collection by requesting to withdraw from its second ESP application while claiming it would return to rates in effect in September 2013 (the month the Commission authorized the second ESP). However, DP&L's proposed tariffs advanced provisions, terms, and conditions that were different than its first ESP; for example, proposing to return to the nonbypassable RSC but not returning to the fully bypassable TCRR.

In a Finding and Order dated August 26, 2016 issued in the *ESP II Case*, the Commission authorized DP&L to withdraw from its second ESP. IEU-Ohio has separately sought rehearing of that decision.

In its August 26, 2016 Order in this case, the Commission authorized DP&L to implement a set of provisions, terms, and conditions plucked from the first ESP (*e.g.*, the RSC) and the second ESP (*e.g.*, the nonbypassable TCRR-N).

As discussed below, the Order was unlawful and unreasonable and therefore the Commission should grant this Application for Rehearing. With respect to the TCRR-N, the Commission should direct DP&L to reinstate a fully bypassable TCRR and to modify how DP&L bills its transmission rider. With respect to the RSC, the Commission should direct DP&L to set the RSC rates to zero. To the extent that non-zero rates for the RSC are allowed to remain in place, the Commission should direct DP&L to modify its RSC tariff sheets to reflect customers' rights to avoid the charge if they agree to return to the SSO at market-based rates. Finally, the Commission should grant rehearing and initiate

a proceeding to account for the revenue DP&L collected under the unlawfully authorized SSR and to prospectively reduce rates for that amount.

II. ASSIGNMENTS OF ERROR

A. The Commission's Order allowing DP&L to maintain the nonbypassable TCRR-N is unlawful and unreasonable.

Under ESP I, DP&L's TCRR was fully bypassable.[4] The TCRR collected all costs imposed on DP&L by PJM for market-based and non-market-based transmission services associated with serving 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 Transmission Cost Recovery Rider-Bypassable ("TCRR-B") (recovering market-based costs) and TCRR-N (recovering non-market based costs).[5] 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.

On July 27, 2016, DP&L filed identical motions in this case and in the ESP II case requesting to withdraw its ESP II. On August 1, 2016, DP&L filed proposed revisions to its tariffs to effectuate the withdrawal from the ESP II. These proposed tariffs did not propose any changes to the TCRR-N.

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[4] *See ESP II Case*, Opinion and Order at 36 (Sep. 4, 2013) .

[5] *Id.*

IEU-Ohio filed comments on August 12, 2016 demonstrating that a return to a fully bypassable TCRR was required by the law.

In its August 26, 2016 Order approving DP&L's proposed tariffs, the Commission summarized, but rejected, IEU-Ohio's argument that DP&L must return to the fully bypassable TCRR. The Commission provided three rationales for not requiring DP&L to return to a fully bypassable TCRR. First, the Commission noted that the return to a fully bypassable TCRR would unduly disrupt the SSO competitive bid process ("CBP") because SSO suppliers rely upon DP&L to secure non-market-based transmission service for SSO customers.[6] Second, the Commission noted that competitive retail electric services ("CRES") providers similarly rely upon DP&L to secure non-market-based transmission for shopping customers and therefore a return to a bypassable TCRR would require CRES providers to terminate or renegotiate contracts. Third, the Commission noted a potential disruption in shopping customers' contracts if non-market transmission reverted to being fully bypassable only to become nonbypassable as part of DP&L's next ESP.

Regardless of the merit of the rationales offered by the Commission, the Commission is without authority to authorize the continuation of the TCRR-N when DP&L has withdrawn its ESP II application, thereby terminating ESP II. Moreover, the Commission's rationale for authorizing DP&L to continue to bill transmission services on a nonbypassable basis is without merit. Contrary to the Commission's conclusions, a return to the fully bypassable TCRR would not disrupt the SSO auctions process as DP&L would still provide SSO customers with non-market-based transmission service

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[6] Order at 10.

and SSO auction winners would continue to supply market-based transmission service. Additionally, CRES providers would only need to reverse the process they employed two years ago when DP&L began providing non-market-based transmission service to shopping customers.[7] Accordingly, the Commission's Order was unlawful and unreasonable.

1. The Commission is required to restore the fully bypassable TCRR, which was one of the "provisions, terms, and conditions" of DP&L's prior ESP. R.C. 4928.143(C)(2)(b).

If an electric distribution utility ("EDU") properly exercises its right to withdraw from an ESP, the Commission is then required to issue such orders as necessary to return to the "provisions, terms, and conditions" of the EDU's prior ESP.[8] It is beyond dispute that DP&L's first ESP contained a fully bypassable TCRR, DP&L's second and withdrawn ESP contained the only authorization for the nonbypassable TCRR-N, and that upon withdrawal from the second ESP the Commission did not direct DP&L to return to the fully bypassable TCRR that existed under DP&L's prior ESP.[9] Thus, the Commission has failed to comply with the clear and unambiguous requirements of R.C. 4928.143(C)(2)(b) that require the Commission to issue such orders as necessary to reinstate the provisions, terms, and conditions of DP&L's prior ESP.

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[7] *See ESP II Case*, Opinion and Order at 36 (Sep. 4, 2013); *ESP II Case*, Second Entry on Rehearing at 25 (Mar. 19, 2014).

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

[9] *ESP II Case*, Opinion and Order at 36 (Sep. 4, 2013); Order at 10-11.

2. The Commission is required to comply with its rules, which require transmission riders to be fully bypassable. Rule 4901:1-36-04(B), O.A.C.

The Court has held that "an administrative agency cannot ignore its own rules."[10] 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." This rule may be waived upon good cause shown unless the requirement is otherwise required by the law.[11]

Although DP&L was granted a waiver of the bypassable TCRR requirement in the ESP II case, DP&L has withdrawn that application, thereby terminating the Commission's waiver of Rule 4901:1-36-04(B), O.A.C. DP&L did not request a new waiver of the bypassability requirement and has not offered any reasonable basis for authorizing a waiver of the requirement that the transmission rider be bypassable.

Thus, DP&L has not sought a waiver of the bypassability requirement for its transmission rider, and there is no basis for the Commission to make a finding supporting the waiver. Furthermore, as discussed herein, the Commission may not, as a matter of law, authorize DP&L to bill and collect transmission costs on a nonbypassable basis.

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[10] *In re Columbus S. Power Co.,* 129 Ohio St.3d 46, 2011-Ohio-2383 ¶ 35 (*quoting State ex rel. Kroger Co. v. Morehouse*, 74 Ohio St.3d 129, 133, 1995-Ohio-300).

[11] Rule 4901:1-36-02(B), O.A.C.

3. The authorization of the nonbypassable TCRR-N is preempted by federal law because it blocks customers from taking service directly under PJM's OATT and because costs are not allocated and billed in the same manner as required by PJM's OATT. U.S. Const. Article IV, Clause 2 (Supremacy Clause); 16 U.S.C. § 824(b)(1) (Federal Power Act).

Under Section 201 of the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over transmission-related services.[12] Under Order 888, FERC ordered functional unbundling of wholesale generation and transmission services. FERC also imposed a similar open access requirement on unbundled retail transmission service in interstate commerce.[13] 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.[14] Because FERC has exclusive authority over transmission services in interstate commerce, state action in the same field is preempted.[15]

FERC has exclusive jurisdiction to establish the price of retail transmission through the PJM tariffs for customers of Ohio EDUs because Ohio law requires EDUs to unbundle their electric services and to transfer the control of transmission facilities to a qualifying transmission entity. To implement unbundling, Senate Bill 3 ("SB 3") required an EDU to file unbundled rate components in its transition plan.[16] To assure that the EDU recovered the costs it incurred for securing transmission services to serve its retail

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

[13] *New York v. FERC*, 535 U.S. 1 (2002).

[14] *Id*.

[15] *Id.*

[16] R.C. 4928.12 & 4928.35.

load, the Commission has authority to provide recovery of FERC-approved transmission-related costs imposed on or charged to the utility by FERC or a regional transmission organization ("RTO").[17]

Under FERC's supervision and regulation, PJM is the RTO that controls the transmission system that covers DP&L's service area. PJM's 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.[18] 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."[19] Ohio requires an EDU such as DP&L to unbundle retail electric services.[20] 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 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

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[17] R.C. 4928.05(A)(2).

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

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

[20] R.C. 4928.07 and 4928.31.

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 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.[21] 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.[22]

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 individual NSPL under the TCRR-N and did not do so under the TCRR either.[23] 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

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[21] 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).

[22] *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).

[23] *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 (Apr. 28, 2015); *Id*. at Schedule A-1, Ninth Revised Sheet No. T8, page 3 of 4 (Apr. 28, 2015).

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.[24] 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, the Commission must direct DP&L to reinstate the fully bypassable TCRR and direct DP&L to bill the TCRR (regardless of whether it is bypassable or nonbypassable) in a manner consistent with federal requirements.

B. The Commission's Order is unlawful and unreasonable because the Commission did not address IEU-Ohio's arguments that the law requires DP&L's TCRR to be fully bypassable. R.C. 4903.09.

In its Comments filed in this matter on August 12, 2016, IEU-Ohio demonstrated that R.C. 4928.143(C)(2)(b) and the FPA required the TCRR to be fully bypassable.[25] IEU-Ohio also demonstrated that the TCRR-N was preempted because it was being billed in a manner that conflicted with federally-approved tariffs. IEU-Ohio further

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[24] 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.

[25] IEU-Ohio's Comments at 4-8 (Aug. 12, 2016).

demonstrated that the Commission's rules required the TCRR to be fully bypassable, that no good cause was offered for a waiver of the rule, and that the rule, in any event, could not be waived.

The Commission failed to address these arguments raised by IEU-Ohio in its Order. The Commission, however, is required to address arguments raised by parties.[26] Because the Commission is required to address IEU-Ohio's arguments, it should grant rehearing, and require DP&L to implement a fully bypassable TCRR consistent with IEU-Ohio's previously-stated assignments of error.

C. The Commission's Order authorizing the RSC is unlawful and unreasonable.

1. The authorization of the RSC at a non-zero rate was not a lawful and reasonable exercise of the Commission's powers and it conflicts with the Commission's own rationales offered in the Order. R.C. 4905.22; Order at 8-9; *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 38.

In the Order, the Commission authorized DP&L to implement the RSC rates that existed under DP&L's first ESP [which were designed to provide DP&L approximately $76 million/year for its provider of last resort ("POLR") risks]. Although it is not disputed that the RSC was a provision, term, or condition under DP&L's first ESP, continuing the RSC at a non-zero rate is not just and reasonable because DP&L does not currently have POLR costs and risks. As the Commission determined in the Order with respect to the Environmental Investment Rider ("EIR"), even though a charge was a term, provision, or condition of the prior ESP, the charge will not be implemented at its prior

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[26] R.C. 4903.09; *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 30, 70-71; *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 53-57.

rates unless doing so is lawful and reasonable.[27] Such a conclusion is consistent with the Commission's obligation to ensure that rates are just and reasonable.[28]

With respect to the EIR charge, the Commission determined that the purpose of the charge was "to allow DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax expenses to install environmental control devices on its generating units to comply with US EPA regulations."[29] When the EIR was originally authorized, the Commission noted that the generating units (associated with the environmental upgrade costs recovered through the EIR) were being used to provide SSO service to non-shopping customers. At this point, however, SSO service is supplied through competitive auctions. "With the implementation of the competitive bidding process to procure retail electric generation from wholesale suppliers, those generating units and their associated environmental controls are not currently being used to provide public utility service to non-shopping customers under the standard service offer."[30] Therefore, the Commission concluded that while the EIR would be authorized, its rates would be set to zero.

Based on this rationale, the Commission must set the RSC rates to zero because continuing the rates at a level designed to recover $76 million in POLR costs is not just and reasonable. The RSC rates can trace their genesis to Case No. 02-2779-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

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[27] *See* Order at 8-9.

[28] R.C. 4905.22; R.C. 4928.02.

[29] Order at 8-9.

[30] *Id.* at 9.

generation charges as of January 1, 2004.[31] Following the approval of the RSP, DP&L filed in Case No. 05-276-EL-AIR its request to implement the RSC.[32] 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.[33] As part of a Commission-approved stipulation in the *RSC Case*, the Commission authorized the maximum 11% increase through the RSC, translating to an annual charge of approximately $76 million.[34] Through a Commission-approved stipulation in DP&L's first ESP, the RSC was authorized to remain in place through December 31, 2012.[35]

Just like the EIR, circumstances have changed with respect to authorization of the RSC rates. Unlike circumstances in 2004 through 2016, DP&L currently has no obligation to provide generation service to SSO customers; DP&L has transferred its POLR obligation to the SSO suppliers. Only in the event of a default by an SSO supplier would DP&L potentially be exposed to any obligation or costs to provide SSO service. But as discussed below, that obligation may be assumed by other parties and any costs DP&L actually incurs will likely be recoverable through means separate from a POLR charge.

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[31] *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 'provider-of-last-resort' ('POLR') costs."; *Id*. at ¶18, 24-26.

[32] *RSC Case*, Application at 2 (Apr. 4, 2005).

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

[34] *RSC Case*, Opinion and Order at 11 (Dec. 28, 2015).

[35] Stipulation and Recommendation at 4 (Feb. 24, 2009).

For example, if an SSO supplier defaults, DP&L may voluntarily ask other SSO suppliers to assume the defaulting supplier's tranche obligation.[36] In the event that no other supplier is willing to assume that obligation, DP&L would then assume that supply obligation. However, the costs associated with that supply obligation would be offset by the SSO revenue DP&L would be entitled to receive as an SSO supplier. If DP&L's cost to secure this power was greater than the SSO clearing price, one potential solution would be for the Commission to allow DP&L to adjust its base generation rates to produce the revenue required to pay the SSO suppliers and cover its costs of market purchases.

In any event, if DP&L's cost of market purchases exceeds the revenue DP&L would be entitled to receive as an SSO supplier, DP&L would have a right to "draw down, liquidate, set-off against, or demand payment under, any Guaranty, ICR Collateral and Margin Collateral"[37] provided by the defaulting SSO supplier as a condition of participating in the SSO auctions. Finally, if the guarantees and collateral were insufficient to cover any net costs DP&L incurred to provide SSO supply, DP&L would be further entitled to seek recovery of that net cost from the defaulting supplier.[38] Only after all of these means are exhausted would DP&L potentially have any POLR costs. Based on this reality, authorizing the RSC rates at a level designed to permit DP&L to recover $76 million in non-existent POLR costs is not just and reasonable.

In its Order, the Commission notes that DP&L retains its POLR obligation over the long term. However, the Court has held that the Commission's concerns for the

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[36] *ESP II Case*, Testimony of Robert J. Lee, Attachment RJL-2 at 29-30 (Oct. 5, 2012).

[37] *Id.* at 26.

[38] *Id.* at 27-30, 56.

future do not permit the Commission to craft its own remedies.[39] Furthermore, the future is not likely to result in DP&L incurring $76 million in POLR costs on an annualized basis. Based on the course the Commission has paved, it is highly likely that when DP&L's current SSO auction contracts expire on May 31, 2017, the Commission will have authorized a new SSO auction process for supply beginning June 1, 2017. Additionally, DP&L will have divested its generation by the end of 2016 and, therefore, if DP&L did have an obligation to provide SSO customers with generation service the SSO price would be equal to the price DP&L paid to purchase that generation service from the market. Thus, even if the Commission's concern for the future was a valid basis for setting rates that are not currently just and reasonable, the Commission's noted concern relative to DP&L's potential for future POLR costs is overstated and therefore unreasonable and unlawful.

In sum, it is unlikely that DP&L will have any net POLR costs through May 31, 2017, the period in time covered by the SSO auctions. Beyond May 31, 2016, DP&L will not own any generation and it is likely that DP&L's SSO rates will therefore be set at market-based rates either through DP&L's market purchases or through SSO auctions. Serving SSO customers at market-based rates largely eliminates an EDU's POLR risks and costs.[40] Because DP&L's POLR costs and risks are minimal, and likely non-existent, authorizing DP&L to recover $76 million on an annualized basis in POLR costs is not a just and reasonable result. Accordingly, consistent with the Commission's

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[39] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 38; *Indus. Energy Users-Ohio v. Pub. Util. Comm.,* 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 23.

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

findings with respect to the EIR, the Commission should require DP&L to set the RSC rates to zero.

2. If the Commission allows the RSC to remain in effect at a non-zero rate, then the Commission must direct DP&L to modify the RSC tariff sheet to include the ability to bypass the RSC by customers that agree to return to the SSO at market-based rates. R.C. 4928.143(C)(2)(b); *AEP ESP I Case*, Opinion and Order at 40 (Mar. 18, 2009).

Although DP&L's first ESP provided customers served under government aggregation programs to bypass the RSC,[41] the August 26, 2016 Order does not reflect this option. Accordingly, the RSC authorized by the Commission is inconsistent with the terms, provisions, and conditions of DP&L's first ESP in violation of the requirements of R.C. 4928.143(C)(2)(b).

Furthermore, the Commission's precedent extends the right to bypass POLR charges to all customers agreeing to return to SSO rates at market-based rates. In AEP-Ohio's first ESP case, the Commission recognized the statutory right of government aggregation customers to elect to bypass POLR charges if they agreed to return to the SSO at market-based rates.[42] Consistent with this statutory right, the Commission extended the right to bypass POLR charges to all customers who agreed to return to the SSO at market-based rates.[43] In doing so, the Commission recognized that agreeing to be served at market-based rates largely mitigated an EDU's POLR costs and risks.[44]

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[41] Opinion and Order at 5 (June 24, 2009).

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

[43] *Id.*

[44] *Id.*

In reauthorizing the RSC, the Commission is generally required to apply its precedent.[45] Although the Court has recognized that the Commission may deviate from its precedent, the Commission is required to explain its rationale for deviating from its precedent and the new course must be substantively lawful and reasonable.[46] Thus, the Commission must explain why it has deviated from its precedent of allowing customers to bypass a POLR charge on condition that the customers agree to return to the SSO at market-based rates. Furthermore, based on the Commission's application of R.C. 4928.143(C)(2)(b) in the context of retaining the SSO auctions and setting the EIR and Fuel Riders to zero, it is apparent that the Commission does not believe it must blindly implement the provisions, terms, conditions, and rates that previously existed without first considering if implementing the prior rates is just and reasonable.

Accordingly, if the Commission does not direct DP&L to set the RSC rates to zero, the Commission must direct DP&L to modify the RSC tariff sheets to reflect the rights of all of DP&L's customers to avoid the charge if they agree to return to the SSO at market-based rates.

D. The Commission's Order is unlawful and unreasonable because the Commission failed to address IEU-Ohio's arguments regarding the RSC. R.C. 4903.09.

In its Comments filed in this matter on August 12, 2016 pursuant to an Attorney Examiner Entry, IEU-Ohio demonstrated that the ESP I stipulation and Commission

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[45] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 52 (*quoting Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975) ("It is true that we have instructed the commission to 'respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.'").

[46] *Id.* ("This does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why . . . [and] "[t]he new course also must be substantively reasonable and lawful.").

precedent required the RSC to be bypassable by customers that agree to return to the SSO at market-based rates.

The Commission failed to address these arguments raised by IEU-Ohio in its Order. The Commission, however, is required to address arguments raised by parties.[47] Accordingly, the Commission should grant rehearing and set the RSC rates to zero. If the Commission does not take that action, at a minimum, the Commission should follow its precedent and direct DP&L to modify the RSC tariff sheets to reflect the rights of all of DP&L's customers to avoid the charge if they agree to return to the SSO at market-based rates.

E. The Commission's Order is unlawful and unreasonable because the Commission failed to address IEU-Ohio's arguments regarding initiating a proceeding to account for the amounts that DP&L billed and collected under the SSR and order a prospective reduction in rates. R.C. 4903.09.

In its Comments filed in this matter on August 12, 2016 pursuant to an Attorney Examiner Entry, IEU-Ohio demonstrated that the Commission should initiate a proceeding to account for the amounts that DP&L billed and collected under the SSR and order a prospective reduction in rates.

The Commission failed to address these arguments raised by IEU-Ohio in its Order. The Commission, however, is required to address arguments raised by parties.[48] Accordingly, the Commission should grant rehearing, and initiate a

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[47] R.C. 4903.09; *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 30, 70-71; *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 53-57.

[48] R.C. 4903.09; *In re Application of Columbus S. Power Co.,* 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 30, 70-71; *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, ¶ 53-57.

proceeding to account for the amounts that DP&L billed and collected under the SSR and order a prospective reduction in rates.

F. The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful SSR and to prospectively adjust the rates of DP&L in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission's failure to initiate such a proceeding is based on *Keco*, the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and direct that proceedings affording prospective rate relief be initiated.

As noted above, in its Comments, IEU-Ohio sought a Commission order initiating a proceeding to account for the amounts that DP&L billed and collected under the SSR and prospectively reduce rates. The Commission did not address IEU-Ohio's arguments on this issue. Such a failure is independently unlawful and unreasonable.[49] Furthermore, by failing to address IEU-Ohio's request, the Finding and Order implicitly denied it.

The Commission's denial of the request was in error. To the extent that the Commission's implicit denial was based on *Keco* and the related cases, the Commission should find that *Keco* does not bind the Commission from providing the requested relief. If the Commission determines that its prior decisions extending *Keco* preclude such relief, the Commission (or, on review, the Supreme Court of Ohio) should

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[49] *Supra*, at 22-23.

overrule the cases extending *Keco* that effectively deny customers relief from the injury caused by the Commission's unlawful authorization of the SSR.

1. The Court's decision reversing the authorization of the SSR and recent Commission precedent require the Commission to initiate a proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount.

The Court has implicitly ordered the Commission to initiate a proceeding such as that requested by IEU-Ohio in its Comments. The Commission's failure to comply with the Court's order was in error.

In reversing the Commission's authorization of the SSR, the Court held, "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 ___." ["*Columbus Southern*"].[50] Thus, taken in its entirety, the Court's decision directs the Commission to 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 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.[51] However, the Court found that the nature of the RSR served the same purpose as a transition charge and concluded that the authorization of the RSR unlawfully allowed

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

[51] *ESP II Case*, Opinion and Order at 17, 22, 25 (Sept. 4, 2013); *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) (DP&L asserted that the record supporting AEP-Ohio's RSR "closely resembles" the record supporting its SSR).)

AEP-Ohio to collect transition revenue or its equivalent.[52] The Court then directed the Commission on remand to make prospective adjustments to AEP-Ohio's balance of deferred capacity charges to account for the revenue AEP-Ohio unlawfully collected under the rider.[53]

In its decisions reversing DP&L's SSR, the Court followed its decision in the *Columbus Southern* case. By supporting its decision by reference to the *Columbus Southern* case, the Court implicitly directed the Commission to initiate a proceeding to account for the effects of the unlawful SSR and adjust rates accordingly.

Although the Court ordered an adjustment to an existing deferral in *Columbus Southern*, the decision should not be read to limit the scope of the remedy that the Commission may order in this case. As the Commission determined, it may initiate a procedure by which it will prospectively adjust rates to account for the effects of an order subsequently found by the Court to be unlawful. The order establishing the procedure arose in connection with AEP-Ohio's first ESP case.

In an August 1, 2012 order, the Commission prospectively modified 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.[54] Because that modification occurred after the termination of AEP-Ohio's *ESP I Case*, the Court

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[52] *Columbus Southern*, at ¶ 22-25.

[53] *Id.* at ¶ 39-40.

[54] *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 at 7 (Aug. 1, 2012) ("*AEP PIRR Case*").

reversed the Commission's order reducing the interest rate and remanded the case to the Commission "for reinstatement of the WACC rate."[55]

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. On June 29, 2016, the Commission approved AEP-Ohio's rates that reflected resetting interest rates as of August 1, 2012.[56] 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."[57] 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 collection" of this revenue lost due to the Commission's unlawful action reversed by the Court.[58]

These same factors are present here and therefore warrant prospective modifications to DP&L's rates to remedy the collection of approximately $294 million under the SSR. Taken in its entirety, the Court reversed the SSR, but did not indicate that *Keco* would bar a prospective adjustment of the rates. Based on the Commission's

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

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

[57] *Id*. at 7.

[58] *Id*.

precedent of initiating a proceeding by which rates may be adjusted for the effects of a prior order that the Court has deemed unlawful, the Commission should have granted the relief requested by IEU-Ohio.

Accordingly, the Commission erred when it implicitly denied the request of IEU-Ohio to initiate the proceeding to provide the requested relief to customers. The Commission should grant rehearing and initiate the requested proceeding to account for the amounts that DP&L billed and collected under the unlawful SSR and to prospectively reduce rates based on that accounting.

2. To the extent that the Commission's failure to initiate a proceeding to account for the amounts billed and collected under the unlawful rider and prospectively reduce DP&L's rates to account for the identified amount is based on *Keco*, the Commission should find that *Keco* does not preclude such a proceeding

DP&L seeks to bill and keep the proceeds it received under the Commission's unlawful authorization of the SSR. As evidenced by two important distinctions between *Keco* and the relief requested by IEU-Ohio in this case, however, *Keco* does not warrant the Commission's refusal to initiate the requested proceeding to account for the amounts billed and collected under the unlawful authorization of the SSR.

First, *Keco* addressed the scope of the remedies available in an action brought before a court of general jurisdiction. As the Court explained in *Keco*, the issue was whether a civil action for restitution based on unjust enrichment would lie to recover an increase in rates charged by a public utility when the order authorizing the increase was subsequently reversed by the Court.[59] To resolve this issue, the Court noted that only it

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[59] *Keco*, at 255-56.

was authorized to review utility rates ordered by the Commission and that the utility was required to charge the rates on file with the Commission.[60] The Court further noted that R.C. 4903.16 provided a procedure for suspending rates by posting a bond pending an appeal. Based on that review of the statutes, the Court concluded the General Assembly had abrogated the common law remedy of restitution for amounts paid under an unlawful Commission order through an action in a general division court.[61] Thus, the express issue addressed in *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court had found to be unlawful. *Keco* did not address the Commission's authority to provide a prospective rate adjustment.

A second substantive distinction between this case and *Keco* is that the plaintiff was seeking restitution. In equity, restitution is awarded to a plaintiff when the defendant has been unjustly enriched at the expense of the plaintiff; it is a remedy designed to restore both parties to their original condition or to return something to the owner of it or the person entitled to it upon the reversal of setting aside of a judgment or order of court under which it was taken from him.[62] In contrast to restitution, the prospective rate relief, which is sought in this case, does not restore individual customers to the place they would have been if the order had not been issued; a rate order reducing DP&L rates may or may not restore individual customers to the position they would have been in. Instead, the requested relief reduces rates to eliminate the effect of the prior unlawful order.

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[60] *Id*. at 256-57.

[61] *Id*. at 259.

[62] *Johnson v. Microsoft Corp*., 106 Ohio St.3d 278 (2005); *Wayne Mutual Ins. Co. v. McNabb*, 2016-Ohio-153, ¶ 36 (4th Dist. Ct. App. Jan. 11, 2016); *Black's Law Dictionary* 1477 (1968).

Thus, the *Keco* decision is strictly limited to whether the remedy of restitution will lie as a cause of action in a general division court. IEU-Ohio is seeking relief through a Commission order, and the relief it is seeking is not restitution. Rather, IEU-Ohio has requested an order that the Commission initiate a proceeding to account for the effects of the unlawful SSR and order prospective rate reductions.[63]

3. To the extent that the Commission determines that its prior decisions extending *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to reduce the rates of DP&L to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and initiate such a proceeding.

As discussed above, the Court has already directed the Commission to initiate a proceeding to account for the amounts billed and collected under the SSR and prospectively adjust rates. If the Commission, nonetheless, is under the mistaken belief that it is required to deny customers the relief to which they are entitled based on the

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[63] The distinction between providing restitution and a prospective adjustment to rates is demonstrated in the Court's reasoning in *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997). In that case, the Commission dismissed a complaint seeking relief from rates that had terminated prior to the filing of the complaint. On appeal, the Court upheld the Commission's decision to dismiss the complaint, noting that the complaint had been filed after the challenged rates had ended. Again, the holding was limited; the Court concluded that R.C. 4905.26 and the rate making statutes did not authorize the Commission to order refunds or service credits to consumers based on expired rate programs. *Lucas County Commissioners*, 80 Ohio St.3d at 347. The Court went on to explain that utility ratemaking is prospective only and that retroactive ratemaking was not permitted. *Id*. at 348.

However, the Court also recognized that rates may be adjusted to recover previously deferred revenue without violating the proscription against retroactive ratemaking. The rate at issue in the *Lucas County Commissioners* case, in contrast, had been discontinued and there was no revenue from the challenged program against which the Commission could balance alleged overpayments or order a credit. *Id*. at 348-49.

In this instance, the Commission can adjust the rates billed and collected by DP&L to account for the amounts that were billed and collected under the unlawful SSR. The rates and charges of an ESP continue. These rates and charges provide a mechanism by which the Commission can balance the overpayments or order a credit. Thus, nothing in *Lucas County Commissioners* dictates a decision denying the initiation of a proceeding to determine the amount that was billed and collected under the unlawful SSR and a prospective adjustment of rates.

cases extending *Keco* to Commission proceedings, it (or, on appeal, the Court) should overrule those decisions.

a. **The decisions extending *Keco* are premised on two claims: (1) that *Keco* should be extended to Commission proceedings to prevent the Commission from prospectively adjusting rates to account for an order that has been ruled unlawful by the Court; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates.**

Under this line of cases extending *Keco* to Commission proceedings, the Court has held that "[n]either the commission nor [the] court can order a refund of previously approved rates."[64] Similarly, the Commission has stated that it "cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified."[65]

Typical of the discussion in the cases extending *Keco* to Commission proceedings is the Court's reasoning in a decision addressing the lawfulness of AEP-Ohio's first ESP, *In re Application of Columbus S. Power*, 128 Ohio St.3d 512 (2011). In that case, the Court found that the Commission had authorized AEP-Ohio to retroactively increase its rates by $63 million in violation of the *Keco* "rule" prohibiting

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[64] *Green Cove Resort I Owners' Assoc. v. Pub. Utils. Comm'n of Ohio*, 103 Ohio St.3d 125, 130 (2004) (*citing Keco*); *see also In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 516 (2011) and *Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 121 Ohio St.3d 362, 367 (2009).

[65] *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*., Order on Remand at 36 (Oct. 3, 2011); *see also In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry on Rehearing at 6 (June 22, 2000) (*citing Keco*).

retroactive ratemaking.[66] The Court then held that this finding was a "hollow victory" for customers because *Keco* prohibited the granting of a refund. "Any apparent unfairness … remains a policy decision mandated by the larger legislative scheme. As *Keco* and other cases have noted, the statutes protect against unlawfully high rates by allowing stays."[67] Thus, the refusal of the Court or the Commission to direct prospective rate adjustments turns on two claims: (1) that the "doctrine" of *Keco* applies to Commission proceedings; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates.

As discussed in the next two sections, neither claim survives examination. Moreover, there is no legitimate interest to sustaining this unreasonable and unworkable "doctrine" that substantially injures utility customers. Accordingly, the Commission (or the Court) should overturn those cases extending *Keco* to Commission proceedings because: (1) the decisions were wrongly decided; (2) the decisions defy practical workability; and (3) abandoning the precedents would not create an undue hardship for those who have relied upon them.[68]

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[66] *Id*. at 514-15.

[67] *Id*. at 516.

[68] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 228 (2003).

b. The cases extending *Keco* to prohibit the Commission from prospectively accounting for the effects of an order subsequently found to be unlawful are wrongly decided.

As discussed above, the cases denying relief "based on the doctrine set forth in *Keco*," extend *Keco* beyond its holding.[69] The Court in *Keco* concluded only that the General Assembly had abrogated the common law remedy of restitution for amounts paid under a Commission-ordered rate after the Court reversed the rate order through an action in a court of general jurisdiction. A decision addressing the scope of the jurisdiction of a court to hear a claim for restitution, however, does not determine the jurisdiction of the Commission or the remedies the Commission may order when the Court has found that a previously authorized rate is unlawful.

The scope of the Commission's authority is governed by Title 49.[70] Under R.C. 4928.02, the State Electric Services Policy, the Commission is to "[e]nsure … reasonably priced retail electric service."[71] Under R.C. 4905.22, "no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission." Further, the Commission is empowered to determine if any rate or charge is "in any respect unjust, unreasonable, … or in violation of law" and to remedy that violation.[72] By law, therefore, the rates imposed by the Commission must be just and reasonable and the Commission has the authority to adjust rates to bring them into compliance with Ohio law.

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[69] *Green Cove Resort I Owners Association v. Pub. Utils. Comm'n of Ohio*, 103 Ohio St.3d at 130.

[70] *Dayton Communications Corp.* v. *Pub. Utils. Comm'n of Ohio,* 64 Ohio St.2d 302, 307 (1980).

[71] See, also, R.C. 4928.06(A) (Commission to ensure implementation of R.C. 4928.02).

[72] R.C. 4905.26. *See, also*, R.C. 4928.16 (providing the Commission with jurisdiction to address compliance with provisions of Chapter 4928 under R.C. 4905.26).

Although Ohio law requires rates to be just and reasonable, the Commission often has refused to order the rates to be adjusted to account for the amounts billed and collected under the rate the Court has determined to be unlawfully authorized on the ground that it cannot order a "refund."[73] Yet, this Commission and Court-imposed limitation is inconsistent with the statutory authority of the Commission to ensure that rates are just and reasonable, and nothing in Title 49 of the Ohio Revised Code explicitly provides that the Commission cannot initiate a proceeding to provide prospective relief to account for effects of the authorization of a rate increase that the Court has found was unlawful and to prospectively reduce rates.[74] To the contrary, a failure to adjust rates to account for the effects of a rate subsequently deemed unlawful assures that rates are not just and reasonable, in violation for R.C. 4928.02 and 4905.22.

Further, the Supreme Court has on at least two occasions directed the Commission to adjust rates prospectively to account for the effects of a rate that the Court found to be unlawful. As discussed above, the Court held in *Columbus Southern* that the Commission unlawfully authorized the billing and collection of transition revenue or its equivalent under the guise of a stability rider and ordered the Commission on remand to determine the amount and offset that amount from the balance of deferred

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[73] *AEP ESP I Case*, Order on Remand at 36 (Oct. 3, 2011).

[74] Likewise, R.C. 4905.32 does not prevent the Commission from initiating a proceeding to account for the amounts billed and collected under an unlawful rate and prospectively reduce rates. Under that section, a utility must charge the rates on file with the Commission. There is no provision that prevents the adjustment of rates for the amounts billed and collected under the unlawfully authorized rate. To find otherwise would insert a term that the section also prohibits an order to adjust the existing rate to account for the effects of a prior unlawful order. By inserting an additional implied term, however, the Commission would violate the Court's longstanding rule that it will not add or subtract words from a statute. *In re Application of Ohio Power Co*., 140 Ohio St.3d 509, 515 (2014).

capacity costs to be billed and collected by AEP-Ohio[75]. Similarly, in *Columbus Southern Power Co. v. Public Utilities Commission of Ohio*, 67 Ohio St.3d 535 (1993), the Commission reversed a decision in which the Commission had deferred recovery of amounts found to be lawfully included in rates. The Court then held that the utility may charge to recover previously deferred revenues without violating *Keco* when the recovery was pursuant to rates authorized by an initial Commission order that the Commission had since erroneously limited.

Additionally, the Commission itself recently 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[76]. In support of that finding, the Commission found that the Court's decision taken in its entirety required the recalculation for the entire period and that the Court had not found that *Keco* precluded the collection of the amounts that were not collected during the period under which the reversed order was in effect.[77]

Thus, the "doctrine of *Keco*" that prevents prospective relief is not supported by Ohio law. The holding in *Keco* itself is not applicable to Commission proceedings; rather, it addresses the remedies available in a court of general jurisdiction and holds that an action for restitution, not prospective rate relief, will not lie. Further, the cases extending *Keco* are inconsistent Ohio legal requirements that authorize Commission review of rates and charges to determine if they are just and reasonable and require the Commission to ensure that those rates and charges of a utility are just and reasonable.

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[75] *Columbus Southern*, ¶ 40.

[76] *AEP PIRR Case*, Entry at 7-8 (June 29, 2016).

[77] *Id*. at 7.

And despite the "doctrine of *Keco*," the Court and the Commission have found the Commission may take those actions necessary to correct the effects of a rate found to be unlawful. As this discussion demonstrates, the cases extending *Keco* to deny prospective relief from the effects of an unlawful Commission order are wrongly decided.

c. The extension of *Keco* to prevent rate relief is unworkable under current Commission practice.

i. The delay in review amplifies the injury suffered by customers required to pay the rates authorized under an order subsequently found to be unlawful.

When the Commission routinely grants rehearing for further consideration and then takes no action on matters for months or years, the parties that have successfully pursued an appeal are afforded little or no remedy whatsoever when the Commission wrongly applies *Keco*. The dimensions of both the delay and the amounts that the utilities bill and collect due to the extension of *Keco* are staggering.

Once the Commission issues an order that a party objects to, R.C. 4903.10 dictates the rehearing process a party must follow to challenge the order. A party must initially seek rehearing by the Commission. If a party seeks rehearing and the Commission does not respond to a rehearing application within 30 days, the rehearing application is deemed denied by operation of law. If the Commission does respond to an application for rehearing within the 30-day window, it may deny or grant the application for rehearing. If the Commission grants rehearing within the 30-day window,

> [the commission] shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the

> commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.

While R.C. 4903.10 imposes a 30-day timeframe on a Commission response to an application for rehearing, the Court has approved a process by which the Commission grants rehearing for the purpose of further consideration.[78] Using this authority, the Commission routinely grants applications for rehearing for the purpose of further consideration. While these grants of rehearing for further consideration are pending, injured parties are prevented from securing relief from the Court until the Commission eventually issues a decision, which often simply rejects any remaining issues.

The delays caused by grants of rehearing for further consideration in the *ESP II Case* were substantial. The Commission issued its Opinion and Order in DP&L's *ESP II Case* on September 4, 2013. (In an Entry Nunc Pro Tunc issued on September 6, 2013, the Commission substantially revised the Opinion and Order.) Parties timely sought rehearing of the SSR on October 4, 2013. The Commission granted rehearing for further consideration of the SSR on October 23, 2013. DP&L then filed tariff sheets to implement the SSR on November 15, 2013, and the Commission approved them in an entry issued on December 18, 2013 even though it had not yet addressed the applications for rehearing on which it had granted rehearing of the lawfulness and reasonableness of the rider. The SSR rate became effective on January 1, 2014, again while the Commission further considered the lawfulness of the SSR. On March 19,

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[78] *State ex rel. Consumers' Counsel, v. Pub. Utils. Comm'n of Ohio*, 102 Ohio St.3d 301 (2004).

2014, the Commission then issued an Entry on Rehearing denying the Applications for Rehearing of IEU-Ohio and OCC. Due to concerns raised in the Second Entry on Rehearing, IEU-Ohio and OCC each sought rehearing of the Second Entry on Rehearing on April 18, 2014. The Commission again granted rehearing for the purpose of additional consideration on May 7, 2014. On June 4, 2014, the Commission issued its Fourth Entry on Rehearing denying the applications for rehearing of IEU-Ohio and OCC. Due to alleged errors in the Fourth Entry on Rehearing, OCC filed a Third Application for Rehearing on July 1, 2014. That Application for Rehearing was denied on July 23, 2014. Thus, the Commission granted rehearing for the purpose of reconsideration twice in that case for a total period of approximately six months. During all but two of those months, DP&L billed and collected the SSR.

DP&L's second ESP case is not unique; delay before the Commission issues an order that may be appealed has become the norm. When the Commission increased AEP-Ohio's electric bills to fund above-market generation-related wholesale capacity payments to its affiliated generation business, for example, the Commission issued five entries granting itself additional time for consideration of issues that consumed nearly three years following the Commission's initial decision. When granting rehearing in each of the five instances, the Commission only said that it was doing so to give itself more time to consider the applications for rehearing and it did so without identifying any additional evidence it would take. The Commission's fifth order granting rehearing for further consideration in response to challenges to the Commission's authority to regulate wholesale electric rates and charges established under federal law remained open for two years; the first Commission order granting rehearing for further

consideration of an application for rehearing filed by AEP-Ohio and challenging the jurisdiction of the Commission to proceed on the merits of the application was "further considered" by the Commission without resolution for over two years.[79] Many of these open matters were not resolved until the Commission issued a decision on October 17, 2012.[80]

In the 2011 AEP-Ohio ESP case, the Commission issued an Opinion and Order on August 8, 2012. On October 3, 2012, the Commission granted rehearing for further consideration of claims that the Opinion and Order was unlawful. "Further consideration" continued until January 30, 2013. Meanwhile, the contested rate increase became effective on September 1, 2012.[81]

While the appellate process itself comes with its own delays, the combination of the rehearing and appellate processes translates into huge customer losses. In DP&L's *ESP II Case*, the Commission authorized the rider for 36 months at an annual rate of $110 million a year. Due in part to Commission delay in addressing applications for rehearing, no party was permitted to file a notice of appeal until July 23, 2014 when the Commission issued its Fifth Entry on Rehearing. On August 29, 2014, IEU-Ohio filed its Notice of Appeal. The Court issued its decision on July 20, 2016. Although under a Court mandate to terminate the billing and collection of the SSR, the Commission took

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[79] *See In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-COI (entries granting rehearing for additional consideration issued on Feb. 2, 2011, Feb.12, 2012, Apr. 11, 2012, July 11, 2012, and Aug. 15, 2012).

[80] *Id*.

[81] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*

no action to suspend the charge until it issued the Finding and Order on August 26, 2016 in the *ESP II Case*. That Finding and Order and the Commission's Order in this case, however, permitted DP&L to withdraw its current ESP and to delay filing complying tariffs for another seven days.[82] DP&L filed the new tariffs with an effective date of September 1, 2016. Thus, DP&L was permitted to bill and collect unlawful transition revenue or its equivalent under the guise of a stability rider from January 1, 2014 until September 1, 2016. Because the unlawful authorization of the SSR permitted DP&L to bill customers approximately $9.2 million a month, customers have been billed or will be billed over $294 million in SSR charges during the 32 months that the SSR was unlawfully authorized.

Large customer losses resulting from the refusal to adjust rates prospectively for the effects of rate found to be unlawful have occurred in other cases as well. In the *AEP-Ohio ESP I Case*, the Court acknowledged that the Commission's order resulted in the illegal collection of $63 million which would not be returned to customers.[83] In a subsequent appeal in the same ESP case following the Commission's refusal to prospectively adjust the phase-in rider to account for all amounts unlawfully authorized in POLR charges, the Court acknowledged that its extension of *Keco* to deny prospective adjustment of rates for the effects of a Commission order permitted AEP-Ohio to benefit from a "windfall" of $368 million.[84]

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[82] *ESP II Case*, Finding and Order at 6 (Aug. 26, 2016); Order at 12 (Aug. 26, 2016).

[83] *In re Application of Columbus S. Power Co*., 128 Ohio St.3d 512, 514 (2011).

[84] *In re Application of Columbus S. Power Co*., 138 Ohio St.3d 448, 462 (2014). In related proceedings, the Commission on remand of its order lowering the carrying charge associated with a rider to recover a deferral balance created by the ESP I order increased AEP-Ohio's recovery over the life of the rider by at least $130 million. *AEP PIRR Case*, Entry at 7 (June 29, 2016).

ii. The Commission refused to stay its unlawful orders, and the stay available under R.C. 4903.16 provides no effective customer relief from the effects of an unlawful authorization of a rate or charge.

By seeking a stay either from the Commission or the Court, parties such as IEU-Ohio in DP&L's ESP II case and others have sought to limit the injury from an order of the Commission that they deemed beyond the Commission's authority while the Commission reconsidered its decision and the appellate process moved forward. The standards under which a party may seek a stay, however, do not provide a workable method of limiting the injury caused by an unlawful Commission order.

The Commission will issue a stay if it finds that there has been a strong showing that a moving party is likely to prevail on the merits, that the party seeking the stay shows that it will suffer irreparable harm if the stay is not granted, that the stay will not cause substantial harm to other parties, and that the stay is otherwise in the public interest.[85]

Not surprisingly, the Commission is reluctant to find that it has issued an order that is likely to be reversed. In the *ESP II Case*, for example, the Commission stated that the parties seeking a stay of the order authorizing the SSR had failed to provide a showing "that there is a reasonable possibility that the Supreme Court of Ohio will reverse or remand the ESP Order. The Commission, therefore, finds that the [parties seeking the stay] have not demonstrated that they are likely to prevail on the merits."[86] Without providing any details, the Commission then further found that none of the other

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[85] *In the Matter of the Commission's Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003).

[86] *ESP II* Case, Entry at 6 (Oct. 1, 2014).

requirements for a stay was satisfied either.[87] The Commission then defended its authorization of the SSR in the appeal brought by IEU-Ohio and OCC seeking reversal of the authorization. Under these circumstances, seeking a stay to protect customer interests is essentially a futile act: the Commission will not admit that the order it has just issued and is defending in the Supreme Court should be stayed because it was likely wrong.

Alternatively, the Commission may adopt a procedural posture to deny a stay. In DP&L's ESP II Case, for example, it refused to grant a motion to stay the SSR because IEU-Ohio and OCC had initiated an appeal of the Opinion and Order a month after they filed their motion and the "proper venue" for a request for a stay then rested with the Court.[88] In denying a stay because an appeal has been filed, however, the Commission ignores that the stay from the Court is nearly impossible for a customer to secure.

Under R.C. 4903.16, an appellant may seek a stay from the Supreme Court of a challenged rate during the pendency of an appeal if it can satisfy a security requirement. Due to the magnitude of the monetary claims associated with cases involving electric utilities, however, the security requirement is beyond the means of all parties except the utilities themselves.[89]

Based on Commission practice and the bonding requirements of Ohio law, a rule that prevents prospective relief from an unlawful order leaves customers unprotected and is unworkable. Customers are required to pay unlawfully high rates with no

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[87] *Id*.

[88] *Id*.

[89] See *State ex rel. Industrial Energy Users-Ohio, v. Pub. Utils. Comm'n of Ohio*, 135 Ohio St.3d 367 (2013) (Pfeiffer, J., dissenting).

expectation that they will recover the excessive amounts or a means of cutting off the charges while they challenge the unlawful rates. A less fair or workable outcome would be difficult to conceive.

d. **No party would suffer undue hardship if the Commission initiates a proceeding to prospectively adjust the rates of DP&L to account for amounts unlawfully billed and collected under the unlawful SSR from January 1, 2014.**

No legitimate reliance interest is jeopardized if the Commission initiates a proceeding to prospectively adjust the rates of DP&L to account for the amounts unlawfully billed and collected under the unlawful SSR.

Customers, on the one hand, have been burdened by the unlawful charge for nearly three years, all the while complaining that the authorization of the SSR plainly violated the bar on the collection of transition revenue or its equivalent. They are entitled and have a reasonable expectation to meaningful relief now that their claims have been endorsed by the Court.

On the other hand, DP&L had no reasonable expectation that it could bill the unlawful SSR revenue. As presented to the Commission, the SSR that DP&L proposed was to provide DP&L with above-market revenue in violation of the statutory prohibition on the authorization of transition revenue or its equivalent after the Market Development Period. That prohibition, R.C. 4928.38, has been in effect since 1999. DP&L could not have any legitimate expectation that it could retain the revenue it collected in violation of that prohibition.

Further, the Court has ordered prospective rate relief at least since the 1993 *Columbus Southern* case.

Moreover, the requirement to adjust rates prospectively to account for amounts charged under rates subsequently determined to be unjust or unreasonable would not be new, even to the Ohio utilities. Under federal law, utilities or their affiliates are subject to refund requirements.[90]

Under these circumstances, there is no individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

e. The failure to provide an effective remedy when the Commission imposes illegal charges violates the Ohio Constitution.

Under Section 16 of Article I of the Ohio Constitution, "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy by due course of law, and shall have justice administered without denial or delay."

The failure to prospectively adjust rates to account for the effects of an unlawful authorization operates to deny customers a remedy for the injury done to them. Under the illegal rates, customers are first required to pay unjust and unreasonable charges while they wait for a final order from which they can seek review by the Supreme Court. If they survive the long delays imposed by the Commission and successfully prosecute an appeal, they are then afforded no relief for the injury incurred. This result violates the constitutional requirement that every person have a remedy in due course of law.

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[90] See Federal Power Act §§ 206 and 309.

f. **To the extent the Commission or the Supreme Court determines that *Keco* and the cases following it do not authorize the Commission to initiate a proceeding and prospectively order that rates be adjusted to account for the amounts billed and collected under the unlawful SSR, the Commission or the Court should overrule the cases extending *Keco*.**

In summary, the Commission should overrule those decisions extending *Keco* if the Commission is relying on them to deny customers relief in this case.

Initially, the Commission decisions extending *Keco* to preclude a Commission proceeding to address prospectively the rates of a utility were wrongly decided. Specifically, *Keco* did not address the jurisdiction of the Commission to prospectively adjust rates to account for effects of a Commission order that has been reversed by the Court; rather, the decision held that an equitable remedy could not be pursued in a court of general jurisdiction. At the same time, the Court has recognized that the Commission can provide prospective relief, and the Commission has on occasion applied that authority.

Further, the Commission's error in extending *Keco* into a limitation on its own authority does not conform to the statutory requirements of Title 49 of the Ohio Revised Code. Both R.C. 4905.22 and 4928.02 require that the Commission ensure that rates are just and reasonable. Extension of *Keco* to deny prospective customer relief after the Court has held that a Commission order is unlawful has the effect of affording a "windfall" based on an unlawful order. Assuring a windfall to the party whose claim has been found to be unlawful is the antithesis of a just and reasonable result.

Second, the Commission's application of *Keco* defies practical workability and inflicts serious financial injury on the innocent party. Although parties have 30 days to seek rehearing and the Commission has 30 days to rule on those applications, in

practice the Commission with the Court's endorsement has granted rehearing for further review and then taken no action on the grant of rehearing for extended periods, sometimes years. While the review process slowly moves forward, securing a stay of the unlawful order from either the Commission or the Court is a practical impossibility. During this delay, customers are often required to pay illegally excessive rates to secure vital electric services. When those same customers successfully secure an order from the Court reversing the Commission's unlawful decision to increase their rates, the Commission's extension of *Keco* to deny prospective relief permits the losing party to reap the rewards of an unlawful Commission order. A less workable or fair result is difficult to conceive, but it is the outcome produced by the Commission's review process and the extension of *Keco* to deny prospective relief from the effects of an order subsequently determined to be unlawful.

Third, abandoning the *Keco*-based precedents would not create an undue hardship for those who have relied upon it. Ohio customers would see an improvement in their lot as they are seldom the beneficiaries of the existing regulatory scheme. Moreover, providing rate relief to customers for the effects of an unlawful rate authorization would not be new, even to the Ohio utilities. Prior Court decisions and federal law already provide for such relief. Under these circumstances, therefore, there is no legitimate individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

Further, reversal of the cases extending *Keco* would prevent violations of due process by providing a remedy for the injury inflicted by an unlawful Commission order. In summary, the cases extending *Keco* that DP&L is relying upon to argue that the Commission should not initiate a proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount should be overruled. Because the cases are wrongly decided, unworkable in practice, and harmful in result, the Commission (or the Court) should "right that which is clearly wrong."[91]

III. CONCLUSION

As discussed herein, the Commission's Order was unlawful and unreasonable and therefore the Commission should grant this Application for Rehearing. With respect to the TCRR-N, the Commission should direct DP&L to reinstate a fully bypassable TCRR and to bill its transmission rider consistent with federal law (*i.e.* with a demand charge based on customers' 1 CP). With respect to the RSC, the Commission should direct DP&L to set the RSC rates to zero. To the extent that non-zero rates for the RSC are allowed to remain in place, the Commission should direct DP&L to modify its RSC tariff sheets to reflect customers' rights to avoid the charge if they agree to return to the SSO at market-based rates. Finally, the Commission should grant rehearing and initiate a proceeding to account for the revenue DP&L collected under the unlawfully authorized SSR.

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[91] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d at 232 (Moyer, C.J., concurring).

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 Application for Rehearing and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 26th day of September, 2016, *via* electronic transmission.

/s/ Matthew R. Pritchard
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