BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13.	:	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority	:	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	:	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders	:	Case No. 12-672-EL-RDR

OPPOSITION OF THE DAYTON POWER AND LIGHT COMPANY TO APPLICATIONS FOR REHEARING OF OHIO PARTNERS FOR AFFORDABLE ENERGY AND THE EDGEMONT NEIGHBORHOOD COALITION

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I. INTRODUCTION

The Commission acted correctly to order DP&L to institute temporary rates until rates to be ordered in DP&L's pending ESP case take effect. The Supreme Court of Ohio described the process that the Commission must follow after a remand from the Court:

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

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

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

[1] Aug. 26, 2016 Finding and Order, ¶ 17 (Case No. 12-426-EL-SSO).

that case ("2013 Rates").[2] The 2013 Rates that the Commission approved will be in effect for only a limited time -- DP&L's third ESP case (Case No. 16-395-EL-SSO) is pending before the Commission. The 2013 Rates that the Commission approved will be in effect only until that case is decided.

The Commission correctly held that Ohio Rev. Code § 4928.143(C)(2)(b) establishes that the Commission was required to implement DP&L's 2013 Rates in response to DP&L's withdrawal of its Application in Case No. 12-426-EL-SSO, et al. Ohio Partners for Affordable Energy and The Edgemont Neighborhood Coalition (collectively, "OPAE") argue that the Commission should not approve DP&L's request to implement the Rate Stability Charge ("RSC") that was included in DP&L's 2013 Rates. As demonstrated below, the Commission correctly rejected those arguments because (among other reasons) (1) the Commission is required by Ohio Rev. Code §§ 4928.143(C)(2)(b), 4928.141(A) and 4905.32 to implement the 2013 Rates; (2) OPAE did not seek rehearing of the Commission's June 24, 2009 Opinion and Order approving the RSC and the doctrine of res judicata bars them from now challenging the 2013 Rates; and (3) the RSC is not unlawful.

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

> "the Commission believes that [a stability charge] would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service . . . . Although generation,

[2] Aug. 26, 2016 Finding and Order, ¶ 30 (Case No. 08-1094-EL-SSO).

> transmission, and distribution rates have been unbundled, DP&L is not a structurally separate utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that [a stability charge] will provide stable revenue to DP&L for the purpose of maintaining its financial integrity."

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

Recent actions by credit rating agencies demonstrate the continuing need for such relief following the Supreme Court's reversal of the Commission's decision in that case. On June 27, 2016, S&P Global Ratings ("S&P") stated that the Supreme Court's decision reversing the Commission's decision in Case No. 12-426-EL-SSO "increases the likelihood of a weaker financial risk profile, reflecting weaker financial measures for DPL and DP&L that could result in a near term ratings downgrade." On August 30, 2016, S&P issued a Research Update that affirmed a "BB" issuer credit rating for DP&L and DPL Inc. (i.e., two notches below investment grade), and stated that "[t]he rating outlook is negative." In that same Research Update, S&P further stated that "We could lower the ratings on DPL and DP&L over the next nine months if the company experiences adverse regulatory outcomes that weakened its financial ratios, including FFO to debt that is consistently at or below 9%." Similarly, on July 12, 2016, FitchRatings ("Fitch") affirmed a BB+ credit rating for DP&L and DPL Inc. (i.e., one notch below investment grade) and revised the rating outlook from stable to negative. Fitch explained that "[t]he resolution of the Negative Outlook will depend upon the amount, sustainability and timeliness of alternative regulatory relief from PUCO, as well as the companies' ability to

refinance or repay the 2016 maturities in a timely manner with reasonable terms." The agency "continues to believe that the PUCO will ultimately authorize an alternative rider for DP&L to mitigate the Ohio Supreme Court ruling. However, the path and timing to that end are primary credit concerns." On August 11, 2016, Moody's Investors Service issued a credit opinion that provided a Baa3 issuer rating (i.e., the lowest level of investment grade) with a negative outlook for DP&L. Moody's stated that "We believe that outcome of these different regulatory proceedings will be credit supportive for DP&L and DPL. This view considers PUCO's track record of balanced decisions between the end-users' interests and the utilities group's financial viability. However, the negative outlook captures the uncertainty as to the timing of these decisions and whether the terms of the ESP-III will be also subject to future disputes or judicial challenges."

Thus, the Commission's decision to implement 2013 Rates in this case is not only mandated by law, but also necessary to allow DP&L to maintain its financial integrity so that it can continue to provide safe and reliable service.

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

OPAE first argues (p. 5) that this Commission acted unlawfully outside the scope of its authority to negate the Supreme Court's June 20, 2016 Judgment Entry. As shown below, the Commission was not negating the Supreme Court's Judgment Entry; instead, it was acting in accordance with that Judgment Entry by ordering new rates to be put into effect. The crux of OPAE's argument is its statement on p. 5: "Given that the General Assembly, in enacting R.C. Section 4928.143(C)(2)(a), would have stated that this statute gives the Commission the power to over-ride Supreme Court of Ohio mandates, if the statute did so, it is obvious that the statute

did not do so." This unintelligible sentence, consisting of internally inconsistent statements, provides no basis for rehearing. DP&L has not argued, and the Commission has not concluded that the Commission has the power to override Supreme Court mandates. OPAE's argument that the Commission acted outside of the scope of its authority must be rejected.

OPAE's arguments have several flaws. First, Ohio Rev. Code § 4928.143(C)(2) states:

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

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

OPAE argues (pp. 5-8) that DP&L can withdraw its ESP only after the Commission has modified its Order. Yet that action already has occurred. Sept. 4, 2013 Opinion and Order, pp. 48-49 ("The Commission made numerous modifications to the proposed ESP, including denying the ST, adjusting the term of the ESP to 36 months, adjusting the proposed blending percentages, adjusting the SSR to $110 million per year effective January 1, 2014, and denying the proposed rider AER-N.") (Case No. 12-426-EL-SSO). Although DP&L sought to withdraw its application after the Supreme Court's ruling that reversed the Commission's decision, there is no material difference whether the Commission modifies an ESP in the first instance, or after rehearing, or following reversal by the Supreme Court. In each instance, a utility may withdraw the ESP. In re Application of Ohio Power Co. at ¶ 30 ("As read by the commission, R.C. § 4928.143(C)(2)(a) applies only when the commission is deciding the fate of the ESP application. . . . This would hardly be a 'just and reasonable result.'") (quoting Ohio Rev. Code § 1.47(C)). In fact, the plain meaning of the statute is that a material change to those rates (either by the Commission or the Supreme Court of Ohio) permits the utility to withdraw the application.

Further, in its Finding and Order in Case No. 12-426-EL-SSO, the Commission expressly modified its order approving DP&L's ESP by eliminating the SSR. Aug. 26, 2016 Finding and Order, ¶ 12 (Case No. 12-426-EL-SSO). That modification also established that DP&L had the right to withdraw and terminate its application pursuant to Ohio Rev. Code § 4928.143(C)(2)(a).

In light of the fact that the Commission has modified DP&L's ESP plan from Case No. 12-426-EL-SSO, Section 4928.143(C)(2)(a) plainly gave DP&L the right to withdraw and terminate that plan.

Second, the contention by OPAE that the Supreme Court issued a mandate that prohibited the Commission from entering 2013 Rates is simply not true. The Supreme Court's ruling reads "The decision of the Public Utilities Commission is reversed on the authority of In re Application of Columbus S. Power Co., ___ Ohio St.3d ___, 2016- Ohio-1608, ___ N.E.3d ___." In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016) (emphasis added). Nothing in the Court's Order prohibited the Commission from implementing DP&L's 2013 Rates that were established in Case No. 08-1094-EL-SSO.

Third, in any event, DP&L had the unilateral right to withdraw its ESP II application at any time. DP&L filed that application, and has the right to withdraw it.

DP&L thus has the right to withdraw its ESP application in Case No. 12-426-EL-SSO pursuant to Ohio Rev. Code § 4928.143(C)(2)(a), and the Commission's Finding and Order authorizing DP&L to do so was lawful.

III. THE COMMISSION ORDER IMPLEMENTING THE RSC WAS LAWFUL

The Commission granted DP&L's motion to withdraw and terminate its ESP II[3] pursuant to Ohio Rev. Code 4928.143(C)(2)(a). Aug. 26, 2016 Finding and Order, ¶ 17 (Case No. 12-426-EL-SSO). In this case, the Commission thus held:

> "Pursuant to R.C. 4928.143(C)(2)(b), if the utility terminates an ESP, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO. We note that we have granted DP&L's motion to withdraw *ESP II*, thereby terminating it. Accordingly, with the

[3] DP&L will refer to Case No. 08-1094-EL-SSO as "ESP I," Case No. 12-426-EL-SSO as "ESP II," and Case No. 16-395-EL-SSO as "ESP III."

> termination of *ESP II*, the Commission finds that DP&L shall implement the provisions, terms and conditions of *ESP I*, along with any expected increases or decreases in fuel costs, pursuant to R.C. 4928.143(C)(2)(b), until a subsequent SSO is authorized.
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> * * *
>
> The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. We note there are no further competitive auctions scheduled to procure energy and capacity for non-shopping customers after May 31, 2017. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of *ESP I*. The Commission stated in its December 19, 2012, Entry in this case, '[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.' *ESP I Case,* Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of *ESP I*. *ESP I Case*, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of *ESP I*; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

Aug. 26, 2016 Finding and Order, ¶¶ 20, 23 (Case No. 08-1094-EL-SSO) (alteration in original) (emphasis added).

The Commission's decision was correct for the following separate and independent reasons.

A. OHIO REV. CODE § 4928.143(C)(2)(b) ESTABLISHES THAT THE COMMISSION'S ORDER APPROVING THE RSC WAS LAWFUL

OPAE (pp. 10-12) argues that the portion of the Commission's order that allowed DP&L to collect the RSC was unlawful. Those arguments are inconsistent with Ohio Rev. Code § 4928.143(C)(2). Pursuant to that statute:

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

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

The terms of Ohio Rev. Code § 4928.143(C)(2)(b) are quite clear -- the Commission must implement "the provisions, terms, and conditions of the utility's most recent standard service offer." There is no dispute that DP&L's ESP I is DP&L's most recent SSO. Nor is there any dispute that the RSC was a term of that SSO. Section 4928.143(C)(2)(b) thus establishes that the Commission's order authorizing the RSC is lawful.

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

The Supreme Court reversed the Commission's order approving DP&L's ESP II in toto: "The decision of the Public Utilities Commission is reversed on the authority of In re

Application of Columbus S. Power Co., ___ Ohio St.3d ___, 2016- Ohio-1608, ___ N.E.3d ___." In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016) (emphasis added). The Court could have reversed-in-part or modified the Commission's decision, but did not. Ohio Rev. Code § 4903.13. It also could have identified a portion of the decision that it found "unlawful or unreasonable," but did not. Id. Nor did the Court remand the action to the Commission for further consideration, further demonstrating the full overturning of ESP II. Instead, the Court simply reversed the Commission's decision in toto.

OPAE's contention (pp. 10-12) that the Court's decision was limited to transition cost issues is false. On the contrary, several other errors were raised.[4] It would be unreasonable for the Commission to assume or to speculate that the Court reversed the Commission's decision insofar as it authorized the SSR, but otherwise affirmed it while those various issues were pending.

The Court never instructed the Commission merely to excise the SSR from DP&L's tariff sheets and certainly did not order rates to be lower. Indeed, doing so would be contrary to the Court's longstanding reluctance to involve itself with such detail in the ratemaking process. City of Dayton v. Pub. Util. Comm., 174 Ohio St. 160, 162, 187 N.E.2d 150 (1962) (per curiam) ("The members of this court are neither accountants nor engineers, and

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

manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult question of the reasonableness of the order than is the commission."), modified on rehearing on other grounds, 174 Ohio St. 604, 190 N.E.2d 913 (1963). Accord: Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 108, 346 N.E.2d 778 (1976) (holding that the Court's "task is not to set rates; it is only to assure that the rates are not unlawful and unreasonable, and that the rate-making process itself is lawfully carried out").

Instead, the Court ruled that – in light of In re Application of Columbus S. Power Co. – the Commission's decision in ESP II modifying and approving DP&L's ESP was reversed. In re Application of Dayton Power and Light Co., at ¶ 1. The Commission now must issue an "appropriate order" that "replaces the reversed order." Cleveland Elec., at 117. This result, which leaves to the Commission the specifics of executing the mandate, is consistent with the Court's jurisdiction, which is limited by law to reviewing "final orders" of the Commission. Ohio Constitution Article IV, Section 2(d) (granting the Court "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law"); Ohio Rev. Code § 4903.13 ("A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."). Accord: Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment").

Pursuant to Ohio Rev. Code § 4928.141(A): "Only a standard service offer authorized in accordance with § 4928.142 or 4928.143 of the Revised Code, shall serve as the

utility's standard service offer for the purpose of compliance with this section." Similarly, Section 4905.32 states: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." As the Supreme Court of Ohio reversed in toto the Commission's September 4, 2013 Opinion and Order, those sections establish that the Commission must implement the immediately-prior standard service offer that the Commission authorized for DP&L, which was from ESP I. The Commission's order authorizing the RSC is thus lawful.

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

The Commission's conclusion (¶ 23) that intervenors are barred by the doctrine of res judicata and collateral estoppel from challenging the RSC is correct. Specifically, on February 24, 2009, DP&L filed a Stipulation and Recommendation with the Commission in Case No. 08-1094-EL-SSO. That Stipulation was signed by OPAE.[5] The Commission approved that Stipulation. June 24, 2009 Opinion and Order, p. 13 (Case No. 08-1094-EL-SSO).

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

[5] Feb. 24, 2009 Stipulation and Recommendation, pp. 21-22 (Case No. 08-1094-EL-SSO).

OPAE is also barred from challenging the lawfulness of 2013 Rates by the doctrine of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St. 3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id. (internal citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (internal citation omitted). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (internal quotation marks and citation omitted). Accord: Natl. Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.") (internal quotation marks, citation and emphasis omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St. 2d 241, 246, 431 N.E.2d 672 (1982).

The Commission has held that the principles of res judicata and collateral estoppel apply in Commission proceedings. Aug. 24, 2005 Entry, pp. 3-4 (Case No. 05-886-EL-CSS)

("The Ohio Supreme Court has confirmed that 'where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.'") (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus); Feb. 13, 2014 Opinion and Order, p. 36 (Case No. 12-2400-EL-UNC) ("There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral estoppel applies to administrative proceedings before the Commission."); Dec. 2, 2015 Entry, p. 3 (Case No. 15-796-TR-CVF) ("The Commission finds that Quality Carriers is precluded from raising the same issues in this proceeding that were previously decided in Quality Carriers 1 under the doctrines of res judicata and collateral estoppel.").

Since no party challenged the Commission's decision in ESP I, the Commission correctly held that intervenors (including OPAE) are barred by res judicata and collateral estoppel from challenging the lawfulness of the RSC.

D. THE RSC IS NOT A TRANSITION CHARGE

OPAE (pp. 10-12) argues that the RSC is a transition charge. The Commission found that the RSC was not a transition charge. Dec. 19, 2012 Entry, p. 4 (Case No. 12-426-EL-SSO). Moreover, in the AEP case, the Supreme Court of Ohio held that AEP-Ohio's RSR was a lawful stability charge under Ohio Rev. Code § 4928.143(B)(2)(d). In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 43-59 (Sup. Ct. Ohio Apr. 21, 2016). However, the Court ruled that a portion of AEP's RSR was a transition charge and was barred by Ohio Rev. Code § 4928.38. Id. at ¶ 14-40.

As shown below, AEP did not raise, and a majority of the Court did not consider, whether (1) the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of § 4928.38, and (2) as the later-enacted statute, § 4928.143(B)(2)(d) cannot be not limited by § 4928.38. Those points establish that a stability charge under Ohio Rev. Code § 4928.143(B)(2)(d) is not an unlawful transition charge.

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

Section 4928.143(B)(2)(d) states:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
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> * * *
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> (2) The plan may provide for or include, without limitation, any of the following:
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> * * *
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> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

(Emphasis added.)

The "[n]otwithstanding" clause of Ohio Rev. Code § 4928.143(B) establishes that a stability charge like the RSC is lawful even if it were a transition charge. Specifically, the sections that bar the recovery of transition costs are §§ 4928.141(A) and 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause. DP&L's RSC would thus be lawful even if it was a transition charge.

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

In the AEP case, the majority of the Supreme Court declined to consider whether the "[n]otwithstanding" clause saved AEP-Ohio's stability charge because "no party appears to have raised the issue." In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 38 n.3. Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the Commission to interpret the "notwithstanding" clause. Id. at ¶ 71-79. The Commission may thus consider the "notwithstanding" clause issue in this proceeding, and should conclude that the clause establishes that a stability charge authorized by Ohio Rev. Code § 4928.143(B)(2)(d) is not barred by the transition cost sections.

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

There is a separate and independent reason that the RSC does not violate the prohibition (passed in 1999) in Ohio Rev. Code § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the RSC is lawful under § 4928.143(B)(2)(d). That section was included in Am.Sub.S.B. 221, which was passed in 2008, years after the transition costs statute was enacted.

Section 4928.143(B)(2)(d) was enacted after § 4928.38; therefore, a stability charge approved under § 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge under § 4928.38. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

In its Opinion in the AEP case, the Supreme Court of Ohio noted that § 4928.141(A), which was also included in Am.Sub.S.B. 221 (i.e., at the same time as § 4928.143(B)(2)(d)), includes a prohibition against the recovery of "'previously authorized allowances for transition costs.'" In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 17 (quoting § 4928.141(A)). That section does not change the analysis in the first two paragraphs of this section because the term "transition cost" is defined by statute, and the RSC does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). Ohio Rev. Code § 4928.39(A) ("The costs were prudently incurred.") (emphasis added); Ohio Rev. Code § 4928.39(B) ("The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 22.

In contrast, the RSC was set at an amount to allow DP&L to provide stable retail electric service in the future. June 24, 2009 Opinion and Order, pp. 8-9 (Case No. 08-1094-EL-SSO) (rejecting challenge to RSC and stating that the Stipulation promotes "rate certainty"). Therefore, the RSC does not recover "transition costs," as defined by statute, since the RSC is forward-looking.

In its decision in the AEP Case, the Supreme Court held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by § 4928.38. In re Application of Columbus S. Power Co., at ¶ 25. As demonstrated in the first two paragraphs of this section, the statutory bar against recovering the "equivalent" of transition costs in § 4928.38 does not bar DP&L's recovery of the RSC, because § 4928.143(B)(2)(d) is the later-enacted statute.

Section 4928.141(A) does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, § 4928.141(A) bars the recovery only of "transition costs." Since the RSC is designed to allow DP&L to provide rate certainty in the future, it does not satisfy the statutory definition of transition costs, and it is not barred by § 4928.141(A).

That conclusion – that the equivalent of transition costs can be recovered through § 4928.143(B)(2)(d), and the recovery is not barred by § 4928.141(A) – is consistent with the structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide stable "retail electric service" (a term defined to include generation service) through § 4928.143(B)(2)(d). Such a charge will necessarily be forward-looking. The General Assembly continued the prohibition against the recovery of transition costs (i.e., historic costs of constructing generation plants) in § 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in § 4928.143(B)(2)(d).

In short, the RSC is recoverable under § 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in § 4928.38 is inapplicable because § 4928.143(B)(2)(d) is the later-enacted statute. Further, the RSC is forward-looking

and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in § 4928.141(A) is thus inapplicable.

IV. CONCLUSION

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

Respectfully submitted,

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I certify that a copy of the foregoing Opposition of The Dayton Power and Light Company to Application for Rehearing of Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition has been served via electronic mail upon the following counsel of record, this 3rd day of October, 2016:

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Summary: Memorandum Opposition of The Dayton Power and Light Company to Applications for Rehearing of Ohio Partners for Affordable Energy and the Edgemont Neighborhood Coalition electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company