

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH A STANDARD
SERVICE OFFER IN THE FORM OF AN
ELECTRIC SECURITY PLAN.**

CASE NO. 12-426-EL-SSO

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF REVISED
TARIFFS.**

CASE NO. 12-427-EL-ATA

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR APPROVAL OF CERTAIN
ACCOUNTING AUTHORITY.**

CASE NO. 12-428-EL-AAM

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY FOR WAIVER OF CERTAIN
COMMISSION RULES.**

CASE NO. 12-429-EL-WVR

**IN THE MATTER OF THE APPLICATION OF
THE DAYTON POWER AND LIGHT
COMPANY TO ESTABLISH TARIFF RIDERS.**

CASE NO. 12-672-EL-RDR

SEVENTH ENTRY ON REHEARING

Entered in the Journal on December 14, 2016

I. SUMMARY

{¶ 1} The Commission finds that the assignments of error raised in the applications for rehearing lack merit. Accordingly, the Commission denies the applications for rehearing.

II. PROCEDURAL HISTORY

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

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

{¶ 4} By Order issued on September 4, 2013, in this case, the Commission modified and approved DP&L's application for its second ESP (*ESP II*). Included as a term of *ESP II* was a service stability rider (SSR) for DP&L's financial integrity.

{¶ 5} On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the Commission's decision approving *ESP II* and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, ___Ohio St.3d___, 2016-Ohio-3490, ___N.E.3d___. Subsequently, on July 19, 2016, the mandate issued by the Supreme Court of Ohio was filed in this case.

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

{¶ 7} By Order issued on August 26, 2016, the Commission granted DP&L's application to withdraw *ESP II*, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). The Commission then dismissed this case.

{¶ 8} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 9} On September 23 and 26, 2016, applications for rehearing were filed by OP&E/Edgemont, IEU-Ohio, OEG, OMAEG, Kroger, and OCC. Thereafter, on October 3 and 6, 2016, DP&L filed memoranda contra to the applications for rehearing.

{¶ 10} By Entry issued on October 12, 2016, the Commission granted rehearing for the limited purpose of further consideration of the matters raised in the applications for rehearing. The Commission found that sufficient reason was set forth by the parties to warrant further consideration of the matters raised in the applications for rehearing.

{¶ 11} However, on November 14, 2016, OCC filed an application for rehearing regarding the Commission's granting of rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing. On November 25, 2016, DP&L filed its memorandum contra to OCC's application for rehearing.

III. DISCUSSION

A. *Assignment of Error 1*

{¶ 12} OMAEG, Kroger, and OEG argue the Commission's order was unjust and unreasonable because the Commission found that the Supreme Court of Ohio reversed in total the Commission's order authorizing *ESP II*. OMAEG, Kroger, and OEG each argue the Commission erred when it found the Court reversed *ESP II* in total. They assert the Supreme Court of Ohio only reversed the SSR, but not the remaining provisions, terms, and conditions of *ESP II*.

{¶ 13} DP&L responds by arguing that the Supreme Court of Ohio fully reversed *ESP II*. DP&L argues the Court could have reversed in part or modified the Commission's

order authorizing *ESP II* but did not. Further, the Court could have identified that it found just the SSR to be unlawful or unreasonable, but it did not. DP&L argues the parties' assertion that the Court's decision was limited just to the SSR or transition costs is plainly false. The Court's opinion does not instruct the Commission to excise the SSR from DP&L's tariff sheets and does not order rates to be lowered. Regardless, DP&L notes that the Commission specifically modified *ESP II* to eliminate the SSR, and that pursuant to R.C. 4928.143(C)(2)(a), the Commission's modification of *ESP II* to eliminate the SSR provided DP&L with the right to withdraw and terminate *ESP II*. However, DP&L asserts that it has maintained the unilateral right to withdraw *ESP II* at any time since the Commission's modification and approval of *ESP II* on September 4, 2013.

CONCLUSION

{¶ 14} The Commission finds that the parties' assignment of error lacks merit. The Commission recognized that the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. Order at 5, citing *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * 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 a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). Therefore, pursuant to the Supreme Court's mandate, the Commission modified "its order authorizing *ESP II* in order to eliminate the SSR." Finding and Order (Aug. 26, 2016) at 5. Having modified *ESP II*, as ordered by the Court, the Commission acknowledged and granted DP&L's previously-filed application to withdraw *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 15} As the Supreme Court of Ohio has held, "[i]f the Commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application." *In re Application of*

Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶24-30. Further, the Court has made it clear that, when the Commission modifies an order approving an ESP, the Commission effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. Any modification, whether in part or in total, of an application for an ESP triggers the utility's right to withdraw the application, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). Therefore, whether the Court reversed just the SSR or the ESP in total is moot, as in either instance, the Commission was required to modify its Order approving *ESP II*, which then provided DP&L the right to withdraw *ESP II*, pursuant R.C. 4928.143(C)(2)(a), even if such right did not already exist.

B. Assignment of Error 2

{¶ 16} OEG, OP&E/Edgemont, OMAEG, Kroger, OCC, and IEU-Ohio argue the Commission's Order is unjust or unreasonable because the Commission allowed DP&L to withdraw its application for *ESP II* in violation of R.C. 4928.143(C)(2)(a). The parties aver that while the Commission was mandated to terminate the billing and collection of the SSR, the Commission erred when it apparently found that R.C. 4928.143(C)(2)(a) required the Commission to grant DP&L's withdrawal of *ESP II* upon elimination of the SSR. IEU-Ohio argues that because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, the Commission order terminating the SSR is ministerial only. "A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done." *State ex. rel. Trauger v. Nash*, 66 Ohio St. 612, 618 (1902). Further, "a ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts." *State v. Moretti*, 1974 Ohio App. Lexis 3838 at *8 (10th Dist. Ct. App., Apr. 9, 1974).

{¶ 17} OCC argues the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP within a relatively short period of time after implementing the ESP. OCC asserts that withdrawal of an ESP after 32 months is inconsistent with the law and the General Assembly's intent. OCC then argues the Commission violated R.C. 4928.143(C)(2)(b) by replacing the SSR with a charge that similarly allows the unlawful recovery of the equivalent of transition revenues.

{¶ 18} OMAEG, Kroger, and OPAE/Edgemont argue the Commission erred by impermissibly treating a Court-ordered reversal of a provision of *ESP II* as having the same effect as a Commission-ordered modification to the ESP. They argue that under R.C. 4928.143(C)(2)(a), the utility may terminate and withdraw its ESP only "[i]f the Commission modifies and approves an application" for an ESP (emphasis added). They assert the statute does not grant the utility the right to terminate and withdraw an ESP in response to a modification made by the Supreme Court of Ohio. Additionally, OMAEG and Kroger argue the Commission erred in finding that a utility retains an everlasting right to terminate an ESP. They assert the utility's right to withdraw and terminate an ESP ends upon the filing of tariffs.

{¶ 19} OMAEG, Kroger, and OPAE/Edgemont then aver the outcome of the Commission's determination in this case is to dilute the potency of the direct right of appeal granted by R.C. 4903.13, and has effectively allowed DP&L to override the Court's ruling by moving to withdraw and terminate *ESP II*.

{¶ 20} OEG argues that R.C. 4928.143(C)(2)(a) provides the utility with a right to withdraw an ESP only when a proposed ESP is modified by the Commission. OEG asserts the ESP in this case was not an *application* for an ESP, but a final and fully implemented ESP. Much like OCC, OEG argues the right to withdraw an ESP does not extend indefinitely, but OEG's argument rests on the premise that once the ESP is implemented, it is no longer an "application under division (C)(1) [for an ESP]" as contemplated in R.C. 4928.143(C)(2)(a).

{¶ 21} DP&L argues the Commission's decision to allow DP&L to withdraw *ESP II* is both mandated by law and necessary to allow DP&L to maintain its financial integrity so that it can continue to provide safe and reliable electric service. DP&L asserts the Commission correctly held that R.C. 4928.143(C)(2)(a) establishes DP&L's right to withdraw and terminate *ESP II*. R.C. 4928.143(C)(2)(a) is clear, if the Commission modifies and approves an application for an ESP, the utility may withdraw the application, thereby terminating the ESP. Additionally, DP&L avers the Court has long held that if the Commission makes a modification to an ESP, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶26.

{¶ 22} Further, DP&L argues that R.C. 4928.143(C)(2)(a) contains no limit on the utility's right to withdraw its application for an ESP. DP&L asserts that, although it sought to withdraw its application after the Court's ruling to reverse the Commission's decision to approve *ESP II*, 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 of Ohio. In each instance, DP&L argues, the utility may withdraw the ESP.

CONCLUSION

{¶ 23} The Commission finds that rehearing on this assignment of error should be denied. As we noted above, the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * 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 a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). We are not persuaded, however, that the

Commission consideration of any matter on remand is simply a ministerial act, and IEU-Ohio has cited no precedent in support of this claim. In fact, in many cases, the Commission takes additional comments or holds additional hearings on remand. The Commission modified its Order approving *ESP II* to eliminate the SSR, as ordered by the Court. Because the Commission made a modification to the ESP, the plain language of R.C. 4928.143(C)(2)(a) allows DP&L to withdraw and terminate *ESP II*. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶24-30. Accordingly, pursuant to R.C. 4928.143(C)(2)(a), the Commission granted DP&L's application to withdraw and terminate *ESP II*.

{¶ 24} Further, regarding OEG's argument that the Commission modified DP&L's fully implemented ESP, not its *application* for an ESP, the Court has held that when the Commission modifies an order approving an ESP, it effectively modifies the utility's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. By modifying its Order approving *ESP II*, the Commission modified DP&L's application for the ESP, thereby triggering the provisions of R.C. 4928.143(C)(2)(a).

{¶ 25} Additionally, regarding OCC's argument that the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP only within a relatively short period of time, we note that the Supreme Court of Ohio has stated that it would "not weigh in on whether [the utility] could collect ESP rates for some period of time and then withdraw the plan." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). The Court was referring to whether the utility has an indefinite right to withdraw an ESP after the Commission issues its initial Order modifying and approving an ESP. In the present case, the Commission modified *ESP II* by Order issued on August 26, 2016, and then granted the withdrawal in the same Order. Therefore, like the Supreme Court of Ohio, the Commission does not need to weigh in on whether DP&L could collect the ESP for some period of time and then withdraw it, because that issue is

not present here. In this case, *ESP II* was effectively withdrawn immediately upon the Commission's August 26, 2016 modification of *ESP II*.

C. Assignment of Error 3

{¶ 26} OCC and IEU-Ohio argue the Commission's Order granting DP&L's withdrawal and termination of *ESP II* violated R.C. 4903.09 for failing to set forth the reasons prompting the decision arrived at. IEU-Ohio asserts it sought a Commission order initiating a proceeding to determine the amount that DP&L billed and collected under the SSR and to establish future rate reductions to return the collected amount to customers. OCC and IEU-Ohio assert the Commission's Order was unlawful and unreasonable for both failing to address their argument and for failing to initiate such a proceeding.

{¶ 27} DP&L argues the Commission's Order authorizing DP&L to withdraw and terminate its *ESP II* application was consistent with and required by R.C. 4928.143(C)(2)(a). DP&L asserts the Commission followed the plain language and meaning of R.C. 4928.143(C)(2)(a). The Commission fully explained its reasoning, therefore, DP&L argues, rehearing should be denied.

CONCLUSION

{¶ 28} The Commission finds that the arguments raised by OCC and IEU-Ohio lack merit. Pursuant to R.C. 4928.143(C)(2)(a), if the Commission modifies an ESP, the utility may withdraw the ESP, thereby terminating it. OCC and IEU-Ohio cite to no other conditions or qualifications contained in the Revised Code that the utility must satisfy for it to withdraw an ESP. In this case, the Court issued an opinion requiring the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117. The Commission modified its Order, which provided DP&L the right under R.C. 4928.143(C)(2)(a) to withdraw *ESP II*. DP&L exercised its right and filed a notice of

withdrawal of *ESP II*, which became effective immediately upon the Commission's August 26, 2016 Order modifying the ESP. Therefore, the SSR, which was not reconcilable, was terminated along with the rest of *ESP II*.

{¶ 29} Further, IEU-Ohio's previous request for a proceeding to determine the amount that DP&L billed and collected under the SSR, and to establish future rate reductions to return the collected amount to customers, is moot. The Commission cannot make a prospective adjustment to the SSR to return previously collected revenues to customers because the SSR has been terminated and no longer exists. Accordingly, rehearing on this assignment of error should be denied.

D. Assignment of Error 4

{¶ 30} OEG and IEU-Ohio argue the Commission's Order is unjust and unreasonable because it failed to require DP&L to refund all SSR charges paid by customers to DP&L from the time the SSR was initially approved by the Commission. IEU-Ohio asserts that the Court's opinion in *Keco* does not bind the Commission from initiating a proceeding to refund amounts collected under the SSR to customers. Further, if the Commission finds that its prior decisions extending *Keco* preclude such relief, the Commission or the Supreme Court of Ohio should overrule the cases extending *Keco* to Commission decisions. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 31} Further, IEU-Ohio notes the Supreme Court of Ohio reversed *ESP II* on the authority of *In re Application of Columbus S. Power. Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___" (*Columbus Southern*). Therefore, the Commission must look to *Columbus Southern* to guide the Commission's actions following the Court's reversal of the SSR. In *Columbus Southern*, the Court 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. *Columbus Southern* at ¶¶39-40. Therefore, IEU-Ohio argues the Commission must initiate a proceeding to account for the effects of the SSR and adjust rates accordingly. Such a proceeding, IEU-Ohio argues, would not violate *Keco*.

{¶ 32} Further, IEU-Ohio argues this case is distinguishable from *Keco* in two respects. First, *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court found to be unlawful. Second, in *Keco* the plaintiff was seeking restitution. IEU-Ohio asserts the Commission could authorize prospective relief to reduce future rates to eliminate the effect of the SSR, which would not violate *Keco* or frustrate the precedent prohibiting retroactive ratemaking. Additionally, even if the Commission determines that *Keco* prohibits a proceeding to make prospective adjustments to reduce DP&L's rates to account for the revenue collected under the SSR, the Commission or the Supreme Court of Ohio should overrule those decisions and initiate such a proceeding.

CONCLUSION

{¶ 33} The Commission finds the arguments raised by IEU-Ohio lack merit and the application for rehearing should be denied. In the first instance, the arguments are moot, as DP&L withdrew and terminated the SSR along with the rest of *ESP II*. In the second instance, IEU-Ohio's request would violate long-held precedent established in *Keco* and *Lucas County* prohibiting retroactive ratemaking. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 34} The issue is moot because DP&L withdrew and terminated the SSR along with the rest of *ESP II*. As noted above, R.C. 4928.143(C)(2)(a) provides that if the Commission modifies and approves an application for an ESP, the utility may withdraw its application, thereby terminating the ESP. In this case, the Commission modified its

order approving *ESP II* on remand from the Court. DP&L exercised its right and withdrew *ESP II*, which was effective immediately upon the Commission's Order modifying *ESP II*. The termination of *ESP II* includes the terms, conditions, and charges included in *ESP II*. The SSR was a term of *ESP II* and was terminated along with it. The facts in this case are different from AEP Ohio's rate stability rider (RSR) addressed by the Court in *Columbus Southern*. In *Columbus Southern*, the Court remanded the matter to the Commission to properly adjust the RSR, which was intended to be reconcilable and to extend past the term of AEP Ohio's second ESP, on a going forward basis to account for the Court's opinion. *Columbus Southern* at *7, ¶33, ("AEP will recover its costs in the following manner: * * * collecting any remaining balance of the deferred costs (plus carrying charges) after the ESP period ends."). However, in the present case, the Commission cannot adjust the SSR on a going forward basis because DP&L withdrew and terminated it along with the rest of *ESP II*. There are no prospective rates to adjust because the SSR was terminated. Further, the relief requested by IEU-Ohio would violate the Court's and this Commission's long-held precedent in *Keco* and *Lucas County* prohibiting retroactive ratemaking.

E. Assignment of Error 5

{¶ 35} OCC argues in its November 14, 2016, application for rehearing that the Commission erred by not granting and holding rehearing on the matters specified in OCC's previous application for rehearing. OCC asserts that the errors in the Commission's Order, for which OCC filed its previous application for rehearing, were clear and the Commission should have granted rehearing. Further, OCC argues the Commission failed to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. OCC asserts the Commission's Entry on Rehearing permits the Commission to evade a timely review and reconsideration of its order by the Ohio Supreme Court and

precludes parties from exercising their rights to appeal, which is a right established, *inter alia*, under R.C. 4903.10, 4903.11, and 4903.13

{¶ 36} DP&L asserts that the Commission has a longstanding practice of granting applications for rehearing for further consideration, which allows the Commission to review the myriad of complex issues facing Ohio's diverse public utilities. DP&L argues that this practice is not only consistent with R.C. 4903.10, but has been expressly permitted by the Supreme Court of Ohio. *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶19. DP&L avers that it was lawful and reasonable for the Commission to take additional time to consider the issues raised in the many applications for rehearing filed in this case.

CONCLUSION

{¶ 37} The Commission finds that this assignment of error is moot and that rehearing should be denied. As set forth above, the Commission has fully considered the assignments of error raised by OCC in its September 26, 2016 application for rehearing. As we discussed above, OCC's assignments of error lack merit and we have denied rehearing on those assignments of error. Further, we note that DP&L has ceased collecting charges under the SSR pursuant to our August 26, 2016 Finding and Order terminating *ESP II*. Accordingly, OCC has not demonstrated any prejudice or undue delay as the result of our October 12, 2016 Entry on Rehearing in this proceeding.

IV. ORDER

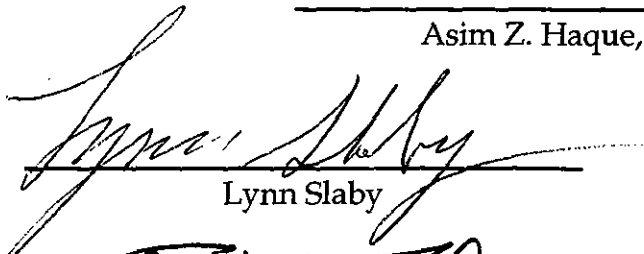
{¶ 38} It is, therefore,

{¶ 39} ORDERED, That the applications for rehearing be denied. It is, further,

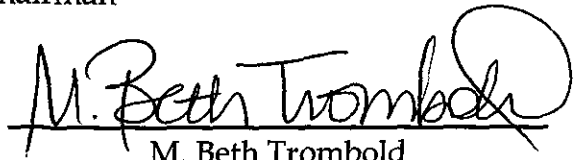
{¶ 40} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold



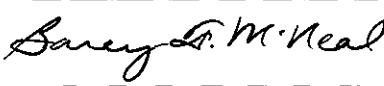
Thomas W. Johnson

M. Howard Petricoff

BAM/sc

Entered in the Journal

DEC 14 2016



Barcy F. McNeal
Secretary