

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-396-EL-ATA
Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code § 4905.13)	

**INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM CONTRA TO THE INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS, IN
PART, THE ELECTRIC SECURITY PLAN APPLICATION**

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I. INTRODUCTION

In its Motion to Dismiss the request of the Dayton Power and Light Company (“DP&L”) for authorization of several nonbypassable riders, Industrial Energy Users-Ohio (“IEU-Ohio”) demonstrated that DP&L’s application failed to properly support the requests for authorization of the Regulatory Compliance Rider (“RCR”), Uncollectible Rider (“UEX”), and Storm Cost Recovery Rider (“Storm Rider”), that the proposed Reconciliation Rider (“RR”) was barred by R.C. 4928.38, and that the nonbypassable transmission rider, the Transmission Cost Recovery Rider-Nonbypassable (“TCRR-N”), did not comply with the rules of the Public Utilities Commission of Ohio (“Commission”) and was preempted by the Federal Power Act. Industrial Energy Users-Ohio’s Motion to Dismiss, in Part, the Electric Security Plan Application Filed by the Dayton Power and

Light Company with Respect to the Regulatory Compliance Rider, Uncollectible Rider, Storm Cost Recovery Rider, Reconciliation Rider, and Transmission Cost Recovery Rider-Nonbypassable and Memorandum in Support (Nov. 21, 2016) (“IEU-Ohio Motion to Dismiss”).

DP&L responds that the Commission is without authority to grant a motion to dismiss in a case in which DP&L is seeking authorization of an electric security plan (“ESP”). Second, it offers several excuses for its failure to file testimony and schedules to support the RCR, UEX, and Storm Rider. Further, it claims that the RR does not recover transition revenue or its equivalent or, in the alternative, that the Commission can ignore R.C. 4928.38. Finally, DP&L argues that IEU-Ohio is precluded from challenging the TCRR-N because the Commission previously approved the rider in DP&L’s last ESP application or that the Commission should defer a decision on the preemption of the rider to the Supreme Court of Ohio. The Dayton Power and Light Company’s Memorandum in Opposition to Industrial Energy Users-Ohio’s Motion to Dismiss the Distribution Modernization Rider (Dec. 6, 2016) (“DP&L Memo Contra”).

The Retail Energy Supply Association (“RESA”) also filed a memorandum opposing the Motion to Dismiss, but limited its opposition to IEU-Ohio’s request that the Commission order DP&L to amend its application so that its proposed transmission rider complies with Ohio and federal law. RESA argues that this part of the Motion to Dismiss is premature, that the Motion to Dismiss is without merit because the rider is a continuation of the current rider, and that a ruling on the TCRR-N should not cause harm to the competitive market. Memorandum Contra to the Industrial Energy Users-Ohio’s Motion to Dismiss, In Part (Dec. 6, 2016) (“RESA Memo Contra”).

For the reasons discussed in detail in the Motion to Dismiss and this Reply, the Commission should dismiss DP&L's request for authorization of the RCR, UEX, Storm Rider, and RR. The Commission should also deny DP&L's request for waiver of the requirement that its transmission rider be bypassable and order DP&L to file a transmission tariff that complies with federal and state law.

II. THE COMMISSION IS AUTHORIZED TO DISMISS AN APPLICATION FOR A STANDARD SERVICE OFFER, OR PORTIONS OF IT, THAT, AS A MATTER OF LAW, CANNOT BE AUTHORIZED

In its Motion to Dismiss, IEU-Ohio seeks dismissal of the request for authorization of the various riders because DP&L has failed to state a claim on which the Commission could grant relief. IEU-Ohio Motion to Dismiss the DMR, Memorandum in Support at 5. In its memorandum opposing IEU-Ohio's Motion to Dismiss, DP&L asserts that motions to dismiss are not permitted in standard service offer proceedings. DP&L Memo Contra at 2. In support of this extraordinary claim, DP&L claims that R.C. 4903.082 does not authorize the Commission to apply Civil Rule 12 standards to its proceedings and "dismissing any portion of the Amended Application would violate DP&L's right to have its proposal heard" under R.C. 4928141(B) and the Commission right to modify an application. *Id.* at 3-4. These claims are unsupported by Ohio law and long-standing Commission precedent.

Initially, DP&L in its Memo Contra provides a technical argument that the Commission's authority to rely on Civil Rule standards to govern its management of its docket is somehow limited to only discovery based on R.C. 4903.082. As provided by that section, the Commission may look generally to the Rules of Civil Procedure. While other parts of that section address discovery, the general statement concerning the

Commission's discretion to consider the Civil Rules is not limited to discovery. In this regard, the statute should be given its plain meaning.

DP&L's argument also ignores that the General Assembly has afforded the Commission broad authority to manage its docket. Under R.C. 4901.13, the "commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all ... hearings relating to parties before it." "Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings." *Duff v. Pub. Util. Comm'n of Ohio*, 56 Ohio St.2d 367, 379 (1978). Further, "[i]t is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n of Ohio*, 69 Ohio St.2d 559, 560 (1982).

In practice, the Commission has frequently granted motions to dismiss without hearing when an applicant has sought relief that the Commission could not lawfully authorize.

In a case involving the Monongahela Power Company, the electric distribution utility ("EDU") sought authorization of a standard service offer without demonstrating in its application that it had met the statutory requirements to terminate the market development period and implement an auction based standard service offer. On a motion to dismiss filed by IEU-Ohio based on the EDU's failure to demonstrate that all of the statutory conditions were met, the Commission dismissed the application. *In the Matter of the Application of Monongahela Power Company for Approval of a Market-Based*

Standard Service Offer and Competitive Bidding Process, Case No. 03-1104-EL-ATA, Finding and Order (Oct. 22, 2003).

Similarly, the Commission granted a motion to dismiss filed by several intervenors of an EDU's application for inclusion of certain projects in its energy efficiency and peak demand reduction compliance plan because the application demonstrated that the projects did not meet statutory requirements. *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case Nos. 09-384-EL-EEC, *et al.*, Entry (Dec. 16, 2009).

In a 2011 case, the Commission granted a motion to dismiss a request by the Office of the Ohio Consumers' Counsel for a show cause order against AT&T Ohio because an intervening change of law rendered the request for the show cause order moot. *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case Nos. 06-1013-TP-BLS, *et al.*, Entry (May 19, 2011).

In a 2004 case, the Commission granted a track owner's motion to dismiss an application seeking an exemption of the requirement for school buses and carriers of hazardous materials from stopping at a railroad crossing. The dismissal was granted after the Commission Staff submitted a letter demonstrating that the crossing did not meet the statutory requirements for an exemption. *In the Matter of a Request for an Exemption from Stopping for School Buses and Other Motor Vehicles at the Highway/Railroad Grade*

Crossing Located at U.S. Route 6 (477-636E), Village of Napoleon, Henry County, Case No. 03-2524-RR-RCP, Entry (June 2, 2004).

In a 1989 case, the Commission granted a motion to dismiss an application seeking a boundary change for a telephone exchange because the application failed to state sufficient facts to support a finding that service was inadequate as required by the applicable statutes. *In the Matter of the Petition of Thelma Penwell and Other Subscribers of the Amanda Exchange of GTE North Inc., Requesting a Boundary Change*, 1989 Ohio PUC LEXIS 818 (Aug. 9, 1989).

This litany of cases demonstrates that the Commission has frequently and properly exercised its authority to dismiss an application without hearing when the application and supporting materials demonstrate that the Commission is without authority to grant the relief requested in the application. DP&L's assertion that the Commission lacks that authority is simply wrong.

Moreover, DP&L's assertion that it has a right to hearing because it is seeking authorization of a standard service offer is without merit. While it is correct that R.C. 4928.141 provides for the Commission to schedule a hearing of an application for a standard service offer, that section does not guarantee DP&L a hearing of an application that is not complete. R.C. 4928.06(A) provides that the Commission is to adopt rules to implement Chapter 4928. Under this authority, the Commission has established rules that define what may be included in an application, Rule 4901:1-35-03, and when it will schedule a hearing on that application, Rule 4901:1-35-06. Division (A) of Rule 4901:1-35-06 in part provides, "After the filing of a standard service offer application that conforms to the commission's rules, the commission shall set the matter for hearing." Thus, by

Commission rule, the Commission may set for hearing only an application that conforms to its rules. Contrary to DP&L's claim, there is no blanket right to a hearing for anything that an EDU labels as an application for a standard service offer and files at the Commission.

As demonstrated at length in IEU-Ohio's Motion to Dismiss, the request for the RCR, UEX, and Storm Rider are unsupported by the Amended Application, the RR violates R.C. 4928.38, and DP&L has failed to demonstrate that the TCRR-N complies with Commission rules or that there is good cause to waive the Commission's requirement that a transmission rider be bypassable. Further, the TCRR-N does not conform to the applicable federally-approved tariff and thus is preempted by the Federal Power Act. Because the Amended Application and supporting testimony lead to the conclusion that the Commission must deny the authorization of the requested riders, the Commission is authorized to grant IEU-Ohio's Motion to Dismiss. R.C. 4901.13; *In the Matter of the Application of Monongahela Power Company for Approval of a Market-Based Standard Service Offer and Competitive Bidding Process*, Case No. 03-1104-EL-ATA, Finding and Order (Oct. 22, 2003).

III. DP&L'S ATTEMPT TO EXCUSE ITS FAILURE TO SUPPORT THE RCR, UEX, AND STORM RIDER BY REFERENCE TO ITS APPLICATION FOR A RATE INCREASE VIOLATES R.C. 4928.143(C)(1) AND COMMISSION RULES REQUIRING AN APPLICANT TO FULLY SUPPORT ITS APPLICATION FOR AN ELECTRIC SECURITY PLAN

Under Commission rules, DP&L must provide a complete description of the ESP and must support each aspect with supporting testimony. Rule 4901:1-35-03(C)(1), O.A.C. In violation of those rules, DP&L failed to provide a complete description of the RCR, UEX, and Storm Rider and failed to support any of these riders with testimony. By

failing to present the complete description of the riders supported by testimony, DP&L has not complied with Rule 4901:1-35-03(C)(1), O.A.C., and cannot meet the burden of proof imposed on DP&L under R.C. 4928.143(C)(1). Accordingly, DP&L is not entitled to the relief it seeks with respect to the RCR, UEX, and Storm Rider.

DP&L seeks to avoid compliance with the Commission's rules through a series of excuses. First, it points to its testimony and supporting schedules filed in its pending rate case under the claim that it has "incorporated" this testimony. DP&L Memo Contra at 7. Second, DP&L tries to excuse its failure to support the requests for these riders on the fact that parties responded to DP&L's requests in their prefiled testimony. *Id.* Third, DP&L seeks to excuse its failure to comply with Commission rules by offering that its failure "has afforded the Commission the flexibility to consider the RCR, UEX, and Storm Rider either in this case or in [DP&L's pending rate case]." *Id.* at 8.

None of these excuses justifies DP&L's failure to present an application that complies with Commission rules.

Initially, DP&L cannot excuse its noncompliance because it "incorporated" its testimony in the rate case as there is no provision for such incorporation in either R.C. 4928.143 or Commission rules. R.C. 4928.143(C)(1) places the burden of proof on the EDU. To satisfy that burden, the rules require DP&L to file a complete set of testimony and supporting schedules:

The application must include a complete set of direct testimony of the electric utility personnel or other expert witnesses. This testimony shall be in question and answer format and shall be in support of the electric utility's proposed application. This testimony shall fully support all schedules and significant issues identified by the electric utility.

Rule 4901:1-35-03(A), O.A.C. (emphasis added). Although the Commission rules require DP&L to file a complete application supporting its requests, DP&L has chosen to ignore the requirements. It is no excuse to say that DP&L has incorporated the necessary information; there is no provision for such incorporation.

Nor should a waiver of the filing requirements be granted. DP&L has not sought a waiver or demonstrated good cause to justify a departure from the requirements of the rules. The rules require the application to be complete because it affords the Commission and the parties a complete presentation of the applicant's requests. Incorporation would frustrate that outcome.

DP&L's second excuse for not filing an application that addresses the RCR, UEX, and Storm Rider is that other parties addressed the issue in their prefiled testimony. This excuse should not be accepted by the Commission because it shifts a burden to intervenors and Staff that is without justification. DP&L has the information to support its application. It could have included the information in its filing, but elected not to. Having failed to comply with the rules, it should not be rewarded because other parties had to respond to its incomplete application out of concern that the Commission will allow DP&L a free pass.¹

Finally, DP&L seeks to excuse its noncompliance because "incorporation" will afford the Commission flexibility to address the riders it is seeking in either the rate case or this case. This excuse, however, fails to address the fact that DP&L did not satisfy the filing requirements to allow the Commission to address its proposed riders in this

¹ As Mr. Bowser, a witness for IEU-Ohio, indicated in his prefiled testimony, he was responding to DP&L's request for the RCR "[o]ut of an abundance of caution." Direct Testimony of Joseph G. Bowser on Behalf of Industrial Energy Users-Ohio at 9 (Nov. 21, 2016).

proceeding. When a utility fails to meet legal requirements, the request must be rejected. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 60-62 (Feb. 25, 2015) (“*AEP-Ohio ESP III Case*”). Since the failure to support the requested riders is patent in this instance, the Commission should summarily deny authorization of them. *In the Matter of the Application of Monongahela Power Company for Approval of a Market-Based Standard Service Offer and Competitive Bidding Process*, Case No. 03-1104-EL-ATA, Finding and Order (Oct. 23, 2003).

IV. THE RR SHOULD BE DISMISSED BECAUSE IT SEEKS THE RECOVERY OF TRANSITION REVENUE OR ITS EQUIVALENT IN VIOLATION OF R.C. 4928.38

Under the proposed nonbypassable RR, DP&L seeks to collect historic and future above-market costs associated with its ownership in the Ohio Valley Electric Corporation (“OVEC”). Such a proposal is unlawful, as confirmed by two recent Ohio Supreme Court cases. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 (“*Columbus Southern*”); *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490 (“*DP&L*”) (reversing the authorization of a stability rider for DP&L).

In response, DP&L urges the Commission to approve the RR based on its decision authorizing AEP-Ohio to bill the above-market costs of its interest in OVEC through AEP-Ohio’s Purchase Power Agreement (“PPA”) Rider. DP&L Memo Contra at 8-9, *citing In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.*, Second Entry on Rehearing at 99-100 (Nov. 3, 2016) (“*AEP PPA*”). Additionally, it argues that the Commission can ignore

the statutory prohibition of the authorization of the collection of transition revenue. According to DP&L, the rider can be approved by the Commission because R.C. 4928.38 is not applicable to the terms of an ESP due to the “notwithstanding” clause contained in R.C. 4928.143(B). Additionally DP&L claims that R.C. 4928.143(B)(2) is controlling because it was enacted after R.C. 4928.38. *Id.* at 9.

These arguments are without merit.

A. Authorization of the RR would permit DP&L to recover transition revenue or its equivalent in violation of R.C. 4928.38

First, the Commission’s reasoning in the *AEP PPA* case is not controlling since it does not address the Court’s analysis in the *Columbus Southern* decision. The Commission again relied on the belief that transition costs are limited to those arising out of generation owned by the utility at the time retail choice was introduced. *AEP PPA*, Second Entry on Rehearing at 99-100. In the *Columbus Southern* case, the Court rejected this same argument that transition revenue is limited to the above-market costs related to specific generation units.

The Court in *Columbus Southern* requires the Commission to consider the “nature” of the revenue to be collected under the rider. *Columbus Southern*, at ¶ 22. As the Court explained, the Commission must look beyond labels: “By inserting the phrase ‘any equivalent revenues,’ the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name.” *Id.*, ¶ 21.

Transition revenue or its equivalent is revenue based on the costs of retail electric generation services that are unrecoverable by an EDU in a competitive market. R.C.

4928.39. In this case, DP&L is seeking to recover through the RR its above-market costs resulting from its interest in the OVEC generation plants. By definition, therefore, DP&L is seeking authorization to bill and collect transition revenue or its equivalent.

The Commission can authorize the receipt of transition revenue only “as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.” R.C. 4928.38. These requirements provide for the recovery of transition revenue only as permitted by Commission order at the request of an EDU as part of an electric transition plan. R.C. 4928.39. Moreover, the time for recovery of transition revenue was limited. DP&L’s application for an ESP is not an electric transition plan application, and the opportunity to seek and recover transition revenue or its equivalent under R.C. 4928.31 to 4928.40 is long over for DP&L and all other Ohio EDUs. R.C. 4928.40 (collection of transition revenue for transition costs not identified as regulatory assets ended no later than December 31, 2005). Based on R.C. 4928.38 and the Court’s decisions in the *Columbus Southern* and *DP&L* cases (which DP&L fails to address), therefore, the Commission is barred from authorizing DP&L to bill and collect through a retail rider the above-market costs of its interest in OVEC.

B. The claim that the Commission may authorize the recovery of transition revenue or its equivalent under R.C. 4928.143 notwithstanding the prohibition in R.C. 4928.38 and 4928.141 should be rejected because it is not supported by legislative intent or the Commission’s prior, simultaneous, and subsequent interpretation and application of the regulatory structure applicable to electric distribution utilities

DP&L also argues that R.C. 4928.143 permits the Commission to authorize the RR even if it would allow DP&L to bill and collect transition revenue or its equivalent. DP&L Memo Contra at 9 (incorporating arguments it has advanced in response to IEU-Ohio’s motion to dismiss DP&L’s request for authorization of the DMR). According to

DP&L, the Commission may ignore the prohibition on the authorization of the receipt of transition revenue or its equivalent on the basis of a “notwithstanding” clause in R.C. 4928.143 or because the later adopted R.C. 4928.143 silently repeals the previously adopted and conflicting R.C. 4928.38. Its statutory arguments are without merit.

In asserting that the Commission can authorize the RR to bill and collect transition revenue or its equivalent, DP&L assumes that the Commission can authorize under R.C. 4928.143(B)(2) the collection of transition revenue or its equivalent. There is no express provision permitting DP&L to bill and collect transition revenue or its equivalent under that section, and, as the Court has already held, that claim is incorrect. *Columbus Southern*, at ¶¶ 14-40; *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490.

DP&L’s attempt to avoid the application of R.C. 4928.38 to bar the RR by pointing to the “notwithstanding” clause also should be rejected because it violates norms of statutory construction.

The “paramount concern in construing a statute is legislative intent.” *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 22. “Notwithstanding” clauses such as that contained in R.C. 4928.143(B)(2) therefore must be read in light of the “paramount concern” of the legislation. *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (*quoting State v. Cook*, 83 Ohio St.3d 404, (1998)) (“A cardinal rule of statutory interpretation is that ‘[a] court must look to the language and purpose of the statute in order to determine legislative intent.’”); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (Haw. 2010); *Yates v. U.S.*, 135 S.Ct. 1074 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (term “tangible object”

in Sarbanes-Oxley Act did not include fish because “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.”).

In this instance, the “notwithstanding” clause in R.C. 4928.143(B)(2) must be read in light of the enactment in the same legislation of R.C. 4928.141, which prohibits an allowance for transition costs and other provisions that render the RR unlawful.

As part of Amended Senate Bill 221 (“SB 221”), the legislation enacting R.C. 4928.143(B)(2) and its “notwithstanding” clause, the General Assembly enacted R.C. 4928.141. Section 4928.141 specifies that an electric utility must maintain a standard service offer and that this offer may take the form of a market rate offer under R.C. 4928.142 or an ESP under R.C. 4928.143. R.C. 4928.141 also addresses the previously enacted prohibition on transition revenue and directs the Commission to exclude an allowance for transition costs from any standard service offer. As the Court recently explained, R.C. 4928.141 “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.” *Columbus Southern*, at ¶ 17.

In SB 221, the General Assembly provided additional direction that it did not intend the “notwithstanding” clause to subsume all of the other statutory provisions in Title 49. In particular, the General Assembly modified the state policy by amending and renumbering R.C. 4928.02(H) to provide that it is the policy of the State to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa,

including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.”² The amendment specifically prohibits a charge such as the RR that provides DP&L’s generation business with additional revenue through a distribution-like, *i.e.*, nonbypassable, charge.

In addition to prohibiting an allowance for transition costs in R.C. 4928.141, the General Assembly also modified R.C. 4928.17. Under then-existing and current law, this section requires an electric utility to separate its competitive generation function from the noncompetitive distribution and transmission functions and prohibits the utility from providing any undue preference or advantage to its competitive generation business unit or the generation business of any affiliate. In SB 221, the General Assembly added a requirement that electric utilities obtain Commission approval prior to divesting any generation assets. It is clear that the General Assembly did not intend to repeal the effect of this statute prohibiting a utility from providing an undue advantage or preference to its own competitive generation business by including the “notwithstanding” language simultaneously in SB 221.

When enacting SB 221 in 2008, the General Assembly also did not repeal R.C. 4928.06 which obligates the Commission to effectuate the state policy contained in R.C. 4928.02. In 2012, the General Assembly subsequently made additional changes to the state policies specified in R.C. 4928.02. See Senate Bill 315. These additional changes

² Prior to SB 221, the statutory section was numbered as division (G) and provided that it is the State's policy to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.” *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48; see also Ohio General Assembly Archives, SB 221, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

did not alter the prohibition in R.C. 4928.02(H). Therefore, it is clear that the General Assembly intends that the state policies continue to have effect.

While the General Assembly has amended Chapter 4928 several times since it enacted R.C. 4928.38 prohibiting the authorization of transition revenue or its equivalent, it has not repealed or given any signal that the one-time opportunity to collect transition revenue or its equivalent was silently repealed or should be ignored. When it has addressed the issue at all, the General Assembly has enacted amendments that bar transition revenue, retain the bar on undue subsidies, and prohibit nonbypassable generation related charges. As the Ohio law currently stands, an electric utility was afforded one opportunity to bill and collect transition revenue, and that opportunity is long over. R.C. 4928.38 to R.C. 4928.40; *Columbus Southern*, at ¶ 15-17.

Furthermore, the Commission's decisions bear out the Commission's understanding that R.C. 4928.143(B)(2) did not silently suspend various other requirements of Chapter 4928, and these decisions should guide the Commission's decision. *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972).

In DP&L's prior ESP case, for example, the Commission rejected another nonbypassable charge proposed by DP&L under R.C. 4928.143(B)(2)(d), the Switching Tracker, because it "violates the policies of the state of Ohio [R.C. 4928.02], is anticompetitive, and would discourage further development of Ohio's retail electric services market." *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 30 (Sept. 4, 2013).

In 2010, AEP-Ohio requested that the Commission authorize a charge under R.C. 4928.143(B)(2)(c) and (d) to allow it to collect costs associated with closing a generation plant. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 7, 17-18 (Jan. 11, 2012) (“Sporn Order”). The Commission rejected AEP-Ohio’s application, finding that it did not have the authority under R.C. 4928.143(B)(2) to allow for such recovery *and* that the recovery of such costs was prohibited by R.C. 4928.02(H). *Id.*

Likewise, the Commission issued a decision that confirms the state policy in R.C. 4928.02 applies to charges authorized under R.C. 4928.143(B)(2). *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 7, 26, 65, 69, 91, 95 (Feb. 25, 2015). In this order, the Commission held that it was required to modify a rider proposed by AEP-Ohio under R.C. 4928.143(B)(2) because the proposed rider would violate the prohibition in R.C. 4928.02(H). In support of the modification it ordered, the Commission stated, “[A]s proposed by AEP Ohio, the [bad debt rider] would flow the bad debt of both shopping and non-shopping customers, whether generation- or distribution-related, through a single rider, which may cause the type of subsidy that the Commission must avoid under R.C. 4928.02(H).” *Id.* at 81. The Commission further held in this order that an additional statutory requirement contained in R.C. 4928.10(D)(3) could not be ignored when authorizing a charge under R.C. 4928.143(B)(2). *Id.* at 82.

In summary, SB 221 and the overall structure of Title 49 make clear that the General Assembly did not intend to give the Commission *carte blanche* to ignore every other statute in Title 49 when authorizing charges under an ESP. The General Assembly's simultaneous and subsequent amendments of Chapter 4928 reflect an intent to maintain the applicability of the prohibitions in R.C. 4928.02(H), 4928.141, 4928.17, and 4928.38. Additionally, the Commission has repeatedly held that the terms and conditions contained in an ESP must conform to the other requirements specified in Chapter 4928. Thus, the "notwithstanding" clause in R.C. 4928.143 does not permit the Commission to authorize a rider that by its nature will violate R.C. 4928.38.

C. The claim that the Commission may authorize transition revenue or its equivalent by resolving an alleged conflict under R.C. 1.52 should be rejected because there is no conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38

In an alternative claim, DP&L asserts that the Court should find that R.C. 4928.143(B)(2)(d) allows the Commission to ignore the prohibition in R.C. 4928.38 because R.C. 4928.143 was enacted after R.C. 4928.38. This claim is premised on R.C. 1.52 and is applicable only if two statutes are irreconcilable. R.C. 4928.143(B)(2)(d), however, is irreconcilable with R.C. 4928.141 and 4928.38 only if the Commission reads words into former statute such that R.C. 4928.143(B)(2)(d) would allow the Commission to authorize transition revenue or its equivalent.

The Court has rejected statutory interpretations that require it to add or subtract words from the statutory language. "It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom." *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948); *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125,

127, 254 N.E. 2d 8 (1969) (In matters of construction, “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.”). The statutes as drafted are reconcilable because R.C. 4928.143(B)(2) does not authorize the recovery of transition revenue or its equivalent, and therefore, the statutory construction rule favoring later enacted statutes is inapplicable.

Even if there were a conflict, the rule would not apply due to the enactment of R.C. 4928.02(H) and 4928.141 in the same legislation. R.C. 1.52 applies only if a later enacted statute conflicts with a previously enacted statute. When the General Assembly enacted R.C. 4928.143(B)(2) in SB 221, it also enacted R.C. 4928.141 prohibiting an allowance of transition costs and amended R.C. 4928.02(H) to prohibit nonbypassable collection of generation costs. Based on the General Assembly’s enactment of provisions prohibiting recovery of transition costs and undue subsidies of generation services in SB 221 at the same time that it enacted R.C. 4928.143(B)(2), the claim that R.C. 1.52 requires the Commission to find that R.C. 4928.143(B)(2) permits DP&L to bill and collect transition charges is without support.

V. DP&L’S PROPOSED NONBYPASSABLE TCRR-N VIOLATES STATE AND FEDERAL LAW AND THEREFORE THE COMMISSION SHOULD DIRECT DP&L TO REVISE AND REFILE THE TCRR AS A BYPASSABLE RIDER

In the Amended Application, DP&L seeks continued authorization of a nonbypassable transmission rider. DP&L also proposes that the charges billed and collected from demand-metered customers be based on either monthly on-peak demand, monthly off-peak demand, or a demand ratchet calculated on the customer’s demand over the previous eleven months.

As IEU-Ohio demonstrated in its Motion to Dismiss, the Commission should deny the requested waiver for two reasons. First, the Commission is preempted by the Federal

Power Act from authorizing a transmission rider that conflicts with the PJM Interconnection, LLC (“PJM”) Open Access Transmission Tariff (“OATT”). Second, DP&L has not presented a lawful and reasonable basis for granting a waiver of the requirement that a transmission rider be bypassable. IEU-Ohio Motion to Dismiss at 12-28.

DP&L and RESA oppose IEU-Ohio’s request that the Commission deny the waiver. DP&L claims that IEU-Ohio is estopped from challenging the rider, that the Commission should leave to the Supreme Court of Ohio the determination whether federal law preempts re-authorization of the TCRR-N, and that a change would be “impractical.” DP&L Memo Contra at 10-13. RESA claims that dismissal of the request for a nonbypassable rider is premature, that there is no intervening event that justifies a change to the current rider, and that a change would harm “competition.”

None of these claims has merit.

Initially, IEU-Ohio is not estopped from opposing the waiver or precluded from doing so because there is not some “intervening event.” Estoppel is not applicable when the issue was not resolved in the prior proceeding. *Ohio Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 111 Ohio St.3d 300, 2006-Ohio-5789 ¶ 75. See *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 ¶ 22, in which the Court held that the Commission retained jurisdiction to address the carrying charges permitted under an electric security plan. In this case, the request for a waiver presents a new issue to the Commission, *i.e.* whether the continuation of the waiver is lawful and reasonable. Because DP&L has placed this issue again in front of the Commission, no party, including IEU-Ohio, is estopped from contesting this part of DP&L’s application.

In resolving IEU-Ohio's motion, moreover, the Commission should not defer a decision on whether it is preempted from authorizing DP&L's request for a nonbypassable transmission rider that bills and collects transmission costs in a manner that is inconsistent than the rates produced under the federally approved tariff for customers that can reduce their contribution to the zonal peak load. In addressing applications, the Commission routinely takes into account constitutional requirements, often at the behest of utility companies, including DP&L.

In particular, the Commission has repeatedly addressed preemption issues before it renders its decisions. For example, in an AEP-Ohio rate case, the Commission held that the issue of whether it was preempted from taking certain actions was a threshold issue that it must address:

Ohio Power's position throughout the case has been that this Commission is federally preempted from considering the Transmission Agreement after it has been filed with FERC. Consumers' Counsel agreed with staff that the Commission should not allow the Transmission Agreement expense, but instead of relying on the staff's prudence argument, it urged the Commission to deny the expense because Ohio Power failed to show that the agreement is cost-based and because the Commission lacks the authority to approve a rate subject to refund.

The issue of this Commission's jurisdiction over the Transmission Agreement must be resolved prior to consideration of other issues.

In the Matter of the Application of Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service, Case No. 85-726-EL-AIR, Opinion and Order at 72 (July 10, 1986). The Commission went on to conclude that it was preempted from excluding the transmission expense that its Staff and the Office of the Ohio Consumers' Counsel ("OCC") had urged be excluded. *Id.* at 80.

In a more recent case, the Commission analyzed whether its regulation of AEP-Ohio's compensation for capacity service was preempted by federal law. *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-UNC, Opinion and Order (July 2, 2012). In that case, the Commission discussed parties' arguments concerning preemption and reviewed applicable federal law, federal regulations, federal tariffs, and FERC-approved contracts. Ultimately, the Commission concluded that while "pursuant to the FPA, electric sales for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC," its exercise of jurisdiction was "consistent with the governing section of the [FERC-approved contract]." *Id.* at 13.

DP&L itself has urged the Commission to address constitutional issues including whether its actions would be preempted. In its prior ESP case and specific to whether the Commission may address whether it is preempted from acting, DP&L urged the Commission to find it was preempted from addressing certain issues raised in the case. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, The Dayton Power and Light Company's Reply Brief at 10 (June 5, 2013). DP&L also has urged the Commission to consider whether an unconstitutional takings would occur if the Commission did not grant DP&L the relief it sought. *Id.*, Direct Testimony of Roger A. Morin at Ex. RAM-2, pages 11-13 (summarizing the foundation of the constitutional takings analysis set forth in the United States Supreme Court's *Hope* and *Bluefield* decisions and urging the Commission to take into account this constitutional principle in authorizing DP&L's return on equity).

Moreover, Ohio Supreme Court decisions addressing the Commission's authority to address constitutional issues hold only that the Commission may not declare an Ohio statute unconstitutional. In *East Ohio Gas Co. v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 239, 28 N.E.2d 599 (1940), for example, the Court held that the "[c]onstitutionality of statutes is a question for the courts and not for a board or commission." In *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 70 Ohio St.3d 244, 247, 1994-Ohio-469 (1994), the Court confirmed a half century after its decision in *East Ohio Gas* that "[a]n administrative agency such as the commission may not pass upon the constitutionality of a statute." As the Court further explained in *Consumers' Counsel*, "nothing precludes the commission from passing upon the proper application or construction of a statute."³ Thus, the Court distinguished between the Commission's authority to declare a statute unconstitutional, a power it does not possess, and the Commission's authority to interpret and apply a statute in the context of constitutional concerns, a power it does possess.

Finally, the concerns of DP&L and RESA that authorization of a bypassable transmission rider is either impractical or anticompetitive are both irrelevant and hyperbolic. These claims are irrelevant because the Commission lacks the authority to impose a nonbypassable transmission rider under both federal and state law. The claims are hyperbolic because DP&L and marketers entered into contracts under a bypassable regime but changed to a nonbypassable, but illegal, regime without a complaint from either that it was too difficult or that existing contracts would be upset. Moreover, the Commission has already authorized a transmission pilot for one EDU and is considering

³ *Consumers' Counsel*, 70 Ohio St.3d at 248.

another pilot that permit customers to take service at rates available under the federally-approved tariff. *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Provide a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion & Order at 73-75 (Mar. 31, 2016); *In the Matter of the Application of 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. 16-1852-EL-SSO, *et al.*, Ohio Power Company's Application to Amend its Electric Security Plan at 17-18 (Nov. 23, 2016).

Compliance with the law is not excused simply because it may be difficult or "impractical," and in any event, DP&L and RESA have not demonstrated that compliance is impractical or will affect competition adversely. Because DP&L did not and cannot show good cause for the waiver or that the waiver would not violate any legal requirement, the Commission must deny the waiver.

VI. CONCLUSION

In its Motion to Dismiss, IEU-Ohio demonstrated that the Commission should dismiss DP&L's request for authorization of the RCR, UEX, Storm Rider, and RR and that it should require DP&L to amend its application to provide for a bypassable transmission rider that would afford customers the benefits of the PJM transmission tariff. DP&L and RESA do not provide any legitimate basis for denying IEU-Ohio's Motion. Accordingly, IEU-Ohio requests the Commission to grant its Motion to Dismiss.

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 *Reply to the Dayton Power and Light Company's Memorandum Contra to the Industrial Energy Users-Ohio's Motion to Dismiss, in Part, the Electric Security Plan Application* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 22nd day of December, 2016, *via* electronic transmission.

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Summary: Reply of Industrial Energy Users-Ohio to the Dayton Power and Light Company's Memorandum Contra to Industrial Energy Users-Ohio's Motion to Dismiss, in Part, the Electric Security Plan Application electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio