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PUCO

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)))	Case No. 17-0204
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	)))))	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	))))	PUCO Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

AMENDED NOTICE OF APPEAL
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal taken to protect customers from being made to pay millions of dollars ($73 million per year) to Dayton Power & Light Company ("DP&L") for unlawful transition charges.

The appeal is taken from PUCO decisions pertaining to the electric security plan of DP&L, Case No. 08-1094-EL-SSO et al. The decisions being appealed are the PUCO's Finding and Order entered in its Journal on August 26, 2016 (Attachment A), and the PUCO's Third Entry on Rehearing of December 14, 2016 (Attachments B).[1] This appeal addresses the PUCO's approval of another unlawful retail stability charge for DP&L.

Appellant is the statutory representative, as established under R.C. Chapter 4911, of DP&L's 456,282 residential customers. OCC was a party of record in the case being appealed.

On September 26, 2016, OCC filed an Application for Rehearing from the PUCO's August 26, 2016 Finding and Order, in accordance with R.C. 4903.10. By Entry dated October 12, 2016, the PUCO granted rehearing for further consideration of the matters specified in numerous parties' applications for rehearing. The PUCO issued its Third Entry on Rehearing on December 14, 2016. In that Entry, it denied all parties' applications for rehearing, including Appellant's, rendering a final, appealable order.

Appellant files this Notice of Appeal complaining of errors in the PUCO's August 26, 2016 Finding and Order, and the Third Entry on Rehearing of December 14, 2016. OCC

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[1] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

alleges that these Orders are unlawful and unreasonable in the following respects, all of which were raised in OCC's Application for Rehearing:

1. The PUCO unlawfully and unreasonably permitted DP&L to implement a retail stability charge that violated the Ohio Supreme Court's order in *In re: Application of Dayton Power & Light Co.*[2] The PUCO's decision was unlawful under R.C. 4903.13 because it did not fulfill the Court's mandate to the PUCO. (Assignment of Error 2, OCC Application for Rehearing).

2. The PUCO unlawfully and unreasonably allowed DP&L to charge customers another retail stability charge when re-implementing DP&L's prior (2012) electric security plan rates, in response to this Court's decision on DP&L's prior electric security plan.[3] DP&L's retail stability charge to all customers collects unlawful transition revenues or any equivalent revenues from customers, violating R.C. 4928.38. (Assignment of Error 1, OCC Application for Rehearing).

3. The PUCO unreasonably precluded parties from re-litigating the reasonableness and lawfulness of DP&L's retail stability charge to customers by applying the doctrines of res judicata and collateral estoppel to its 2012 decision. The PUCO's decision was unreasonable because the PUCO should have considered the changed circumstances since its 2012 decision. The changed circumstances included two Ohio Supreme Court decisions in 2016[4] striking down

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[2] 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179.

[3] *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179.

[4] *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179; *In re: Application of Columbus Southern Power Co.*, 2016-Ohio-1608.

similar retail stability charges to customers. (Assignment of Error 3, Application for Rehearing).

4. The PUCO unreasonably and unlawfully approved DP&L's $73 million (per year) retail stability charge to customers as a provider of last resort ("POLR") charge. The PUCO's decision was unreasonable because DP&L is not providing POLR service to its customers while it is collecting the POLR charge. The PUCO's decision was unlawful because it lacked evidentiary support, violating R.C. 4903.09. (Assignment of Error 4, Application for Rehearing).

Appellant preserved these issues in its Application for Rehearing, filed Sept. 26, 2016. (Attachment C).

OCC respectfully submits that the PUCO's August 26, 2016 Opinion and Order and its Third Entry on Rehearing are unreasonable and unlawful, and should be reversed or modified with specific instructions to the PUCO to correct its errors.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amended Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 13th day of February 2017.

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CERTIFICATE OF FILING

I hereby certify that an Amended Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

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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. 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.	CASE NO. 08-1096-EL-AAM
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR WAIVER OF CERTAIN COMMISSION RULES.	CASE NO. 08-1097-EL-UNC

FINDING AND ORDER

Entered in the Journal on August 26, 2016

I. SUMMARY

{¶ 1} The Commission grants The Dayton Power and Light Company's motion to implement the provisions, terms, and conditions of its first electric security plan until a subsequent standard service offer is authorized by the Commission.

II. PROCEDURAL HISTORY

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

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

{¶ 4} On September 2, 2003, in Case No. 02-2779-EL-ATA, et al., the Commission issued an Opinion and Order (Order) approving a stipulation establishing a rate stabilization period and authorizing DP&L to implement a rate stabilization surcharge (RSS). The RSS allowed DP&L to recover costs associated with fuel price increases or actions taken in compliance with environmental and tax laws, regulations or court or administrative orders, and costs associated with physical security and cyber security relating to the generation of electricity from plants owned by DP&L and its affiliates. *In re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (Sept. 2, 2003).

{¶ 5} Thereafter, on December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved RSS into two separate components: (1) a rate stabilization charge (RSC) and (2) an environmental investment rider (EIR). The RSC was authorized to pay DP&L for costs associated with its provider of last resort (POLR) obligations, while the EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units. The Commission determined the RSC and EIR were both fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). The Supreme Court of Ohio subsequently affirmed the Commission's decision and upheld both the RSC and the EIR. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276.

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

24, 2009). The RSC, EIR, and a fuel and purchased power rider (fuel rider) were included in *ESP I*.

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

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

{¶ 9} On July 27, 2016, DP&L filed a motion and memorandum in support in the *ESP II Case* to withdraw its application for *ESP II*. Pursuant to R.C. 4928.143(C)(2)(a), "[i]f the Commission modifies and approves an application [for an ESP], the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code." Contemporaneous with this Order, the Commission grants DP&L's motion to withdraw *ESP II*, thereby terminating it.

{¶ 10} Pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, 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." Accordingly, on July 27, 2016, DP&L filed a motion in this proceeding to implement *ESP I* pursuant to R.C.

4928.143(C)(2)(b). Thereafter, on August 1, 2016, DP&L filed proposed tariffs to implement *ESP I*.

{¶ 11} Memoranda contra to DP&L's motion to implement *ESP I* were filed in this case by the Ohio Manufacturers' Association (OMA), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA). By Entry issued on August 3, 2016, the Commission requested comments from parties regarding DP&L's proposed tariffs. Comments on DP&L's proposed tariffs were filed by Ohio Partners for Affordable Energy (OPAE), Honda of America Manufacturing, Inc. (Honda), the City of Dayton (Dayton City), OCC, IEU-Ohio, Interstate Gas Supply, Inc. (IGS), RESA, Kroger, and OMA. On August 18, 2016, DP&L filed a reply to the memoranda contra and comments regarding DP&L's motion and proposed tariffs to implement *ESP I*. We note that some parties combined arguments regarding DP&L's motion to withdraw ESP II with arguments regarding DP&L's motion and proposed tariffs to implement *ESP I*. In this case, the Commission is only considering DP&L's motion to implement *ESP I* and the proposed tariffs. As we noted above, the Commission granted DP&L's motion to withdraw ESP II, thereby terminating it, in the *ESP II Case*.

III. Arguments of the Parties

{¶ 12} Pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, 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." DP&L argues in its motion to implement *ESP I* that the Commission must issue an order authorizing it to implement *ESP I*, pursuant to R.C. 4928.143(C)(2)(b) until the Commission approves a subsequent SSO.

{¶ 13} OPAE, Honda, Dayton City, OCC, IEU-Ohio, IGS, RESA, Kroger, and OMA assert that the Supreme Court of Ohio's decision reversing the Commission's decision in *ESP II* should result in a rate decrease, whereas DP&L's proposed tariffs would increase rates to customers. Further, the parties aver that DP&L's proposed tariffs to implement *ESP I* should be moot because the Commission should require DP&L to continue *ESP II* without the SSR. They argue that DP&L's request to implement *ESP I* with the RSC is an attempt to circumvent the Supreme Court of Ohio's decision reversing the SSR.

{¶ 14} Honda, Dayton City, IEU-Ohio, OCC, and Kroger then argue that if the Commission authorizes DP&L to implement *ESP I*, the RSC should not be included because it expired by its own terms and should be terminated. They note that when *ESP I* was originally authorized, DP&L was providing service as a provider of last resort and the RSC was a POLR charge. However, they argue this justification for the RSC is no longer applicable because POLR service is now provided by competitive bidding process auction participants. Since DP&L no longer bears the risk of providing POLR service, they argue that it should not be permitted to collect the RSC. Further, the parties assert that the RSC would unlawfully authorize DP&L to collect transition revenues or equivalent revenues, much like the SSR that was reversed by the Supreme Court of Ohio. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. However, in its reply, DP&L argues the RSC should be implemented as a provision, term, or condition of *ESP I* for three reasons: (1) R.C. 4928.143(C)(2)(b) requires the Commission to continue the provisions, terms, and conditions of *ESP I*, (2) no party sought rehearing of the Commission's Order in the *ESP I Case* so they are barred from re-litigating the RSC due to the doctrines of res judicata and collateral estoppel, and (3) the RSC is a permissible charge authorized by the Commission pursuant to R.C. 4928.143(B)(2)(d).

{¶ 15} Similarly, OCC argues the Commission should not authorize DP&L to collect the EIR. OCC notes the EIR was authorized in *ESP I* to compensate DP&L for investments in its generation units to address United States Environmental Protection Agency (US

EPA) regulations. OCC asserts that DP&L is already collecting the EIR through base generation rates. Therefore, OCC avers that implementing the EIR would authorize DP&L to charge customers twice for the same service. Further, OCC asserts the EIR would unlawfully authorize DP&L to collect transition revenues or equivalent revenues, much like the RSC or the SSR that was reversed by the Supreme Court of Ohio. *In re Application of Dayton Power & Light Co.*, —Ohio St.3d—, 2016-Ohio-3490, —N.E.3d—.

{¶ 16} IEU-Ohio, OMA, and Kroger argue that if the Commission authorizes DP&L to implement *ESP I*, then the Commission should require DP&L to implement the provisions, terms, and conditions of *ESP I* as they were originally authorized. The parties argue that R.C. 4928.143(C)(2)(b) requires DP&L to implement *ESP I* exactly as it was. To do this, IEU-Ohio initially asserts the Commission should direct DP&L to delete its transmission cost recovery rider-bypassable (TCRR-B) and transmission cost recovery rider-nonbypassable (TCRR-N) tariff sheets to implement just the bypassable transmission cost recovery rider authorized in *ESP I*. IEU-Ohio then argues the Commission should direct DP&L to remove its request for shared savings from its application in Case No. 16-329-EL-RDR to update and reduce its energy efficiency rider rates. Further, IEU-Ohio asserts the Commission should direct DP&L to delete the storm cost recovery rider tariff sheet and the reconciliation rider tariff sheet. However, IGS, RESA, and OCC support maintaining some provisions of *ESP II* and support maintaining the integrity of the current market structure, including maintaining competitively bid generation rates and the TCRR-N.

{¶ 17} In its reply, DP&L argues that its proposed tariffs to maintain certain aspects of *ESP II* and market structure will minimize customer and market impacts. DP&L asserts that the parties ignore the following key points: (1) competitive bidding has occurred in DP&L's service territory, and parties have already entered into binding contracts in reliance upon that process, (2) several riders in *ESP I* were not impacted by *ESP II*, and (3) DP&L's rates would actually be <u>significantly higher</u> if new rates were implemented exactly as they were in *ESP I* in 2013. When DP&L filed its proposed tariffs, it noted that it would honor existing contracts with winning competitive bid suppliers through the end of their term in May 2017 and maintain current PJM obligations for all suppliers. Therefore, DP&L intends for its tariffs to reflect the competitive bid rate in order to minimize rate impacts to customers.

{¶ 18} Finally, Honda and Dayton City request clarification concerning DP&L's calculation of fuel costs under the fuel rider and the continuation of the competitive bidding process. Honda and Dayton City also request the Commission establish a procedural schedule in this matter.

IV. Commission Conclusion

{¶ 19} The Commission notes that on December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved RSS into two separate components: the RSC and the EIR. The RSC was authorized to pay DP&L for costs associated with its POLR obligations, while the EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units. The Commission determined both the RSC and EIR were fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). Thereafter, the Supreme Court of Ohio affirmed our decision. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276. By Order issued on June 24, 2009, in this case, the Commission approved a stipulation establishing *ESP I* and continuing the RSC and EIR as terms of *ESP I*. *ESP I Case*, Opinion and Order (June 24, 2009). Further, along with the RSC and EIR, the Commission authorized a fuel and purchased power rider, a storm cost recovery rider, an energy efficiency rider, and a transmission cost recovery rider. No party appealed the Commission's decision approving *ESP I*.

{¶ 20} 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 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.

{¶ 21} As a preliminary matter, the Commission grants DP&L's proposals to recover the costs of energy and capacity obtained through the competitive bid process to serve non-shopping customers through base generation rates (the "standard offer" tariff sheet) and to set the fuel rider to zero, excluding amounts being reconciled from prior periods. R.C. 4928.143(C)(2)(b) requires the Commission to adjust for any expected increases or decreases in fuel costs from those contained in the previous SSO. We find that R.C. 4928.143(C)(2)(b) allows adjustment for purchased power as well as fuel. In this case, all of DP&L's non-shopping customers are being served by energy and capacity purchased from the wholesale markets through the competitive bidding process. It is long standing regulatory practice for "fuel" and "purchased power" to be used interchangeably. For example, DP&L's existing fuel rider specifically includes both fuel and purchased power costs. Therefore, the Commission finds that DP&L's proposed tariffs should be approved as it relates to honoring existing contracts with winning competitive bid suppliers and maintaining current PJM obligations for all suppliers. This will maintain the integrity of the competitive bid process and allow non-shopping customers to continue to benefit from market-based rates.

{¶ 22} With respect to the EIR, the Commission notes the EIR is a bypassable rider, and thus, was part of the rate offered to non-shopping customers in *ESP I*. The EIR was authorized in *ESP I* to allow DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax expenses to install environmental control devices on its generating units to comply with US EPA regulations. However, when the EIR was originally authorized, those generating units were being used to provide public utility service to non-shopping customers as part of the standard service offer. With the implementation of the competitive bidding process to procure retail electric generation from wholesale suppliers, those generating units and their associated environmental controls are not currently being used to provide public utility service to non-shopping customers under the standard service offer. Therefore, while the EIR is a provision, term, or condition of *ESP I*, the environmental controls for which the EIR recovered DP&L's investments are no longer used and useful in rendering public utility service to customers. Accordingly, similar to the fuel rider, the EIR should be approved as a provision, term, or condition of *ESP I*, but should be set to zero. We also note the SSO for non-shopping customers in *ESP I* included base generation rates, the EIR, and the fuel rider. Thus, the energy and capacity obtained by the competitive bidding process should replace the EIR, as well as base generation rates and the fuel rider. As proposed by DP&L, the costs of such energy and capacity will be recovered through the standard offer tariff.

{¶ 23} 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.

{¶ 24} Further, the Commission finds the elimination of the transmission cost recovery riders, TCRR-B and TCRR-N, would unduly disrupt both the competitive bidding process supplying the SSO and individual customer contracts with suppliers of competitive retail electric service (CRES Providers). The wholesale suppliers for SSO customers rely upon DP&L to acquire certain transmission services under the TCRR-N and may not have included the costs of these transmission services in their bids to serve SSO customers. Thus, elimination of the TCRR-N may severely disrupt existing contracts for wholesale suppliers and discourage future participation in the competitive bidding process. Preservation of the integrity of the competitive bidding process is of the highest priority for the Commission. Likewise, CRES Providers also rely upon DP&L to procure certain transmission services under the TCRR-N and could be forced to terminate or renegotiate their contracts with their customers if the TCRR-N were eliminated. Further, if a mechanism like the TCRR-N is eliminated in this case and then restored in DP&L's next SSO, contracts between CRES Providers and individual customers could be further disrupted by the subsequent regulatory change. Accordingly, we will not accept IEU-Ohio's recommendation to eliminate the TCRR-N and TCRR-B at this time.

{¶ 25} However, the Commission understands that a number of mercantile customers could benefit by shopping for all transmission services. The Commission encourages such customers, and IEU-Ohio, to work with Staff to determine whether a filing under R.C. 4905.31 could enable these customers to receive an exemption from the TCRR-N and to shop for transmission services.

{¶ 26} We also disagree with IEU-Ohio's claim that the Commission should direct DP&L to delete its storm cost recovery rider from DP&L's tariffs. The stipulation approved by the Commission in the *ESP I Case* specifically authorized DP&L to request a separate rider to recover the costs of storm damage. Therefore, the storm cost recovery rider is a provision, term or condition of *ESP I*, and DP&L should be permitted to continue its current storm cost recovery rider. *ESP I Case*, Opinion and Order (June 24, 2009) at 5-6.

{¶ 27} Likewise, the Commission disagrees with IEU-Ohio's argument that the Commission should direct DP&L to reduce the rates of the energy efficiency rider to the amounts recovered under *ESP I* and to remove its request for shared savings from DP&L's application in Case No. 16-329-EL-RDR. R.C. 4928.143(C)(2)(*b*) does not require the Commission to reestablish the "rates" of the previous SSO; the statute requires the Commission to continue the "provisions, terms, and conditions" of the previous SSO. Further, we note the stipulation in the *ESP I Case* specifically allows DP&L to implement an energy efficiency rider to recover costs related to programs implemented to achieve compliance with the statutory energy efficiency and peak demand reduction standards. *ESP I Case*, Opinion and Order (Sept. 4, 2013) at 5. Moreover, we find that the issue of whether DP&L should receive shared savings is better resolved in Case No. 16-329-EL-RDR.

{¶ 28} In conclusion, the Commission finds that DP&L's motion to implement *ESP I* should be granted. Therefore, within seven days, DP&L shall file final tariffs, consistent with this Finding and Order, subject to review by the Commission. Finally, the Commission finds that no hearing is necessary in this matter.

V. ORDER

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That DP&L's motion to implement previously authorized rates be granted. It is, further,

{¶ 31} ORDERED, That, within seven days, DP&L file, in final form, two complete copies of its tariff, consistent with this Finding and Order. One copy shall be filed in this case docket and one copy in its TRF docket. It is, further,

{¶ 32} ORDERED, That the effective date of the new tariff shall be a date not earlier than the date of this Finding and Order, and the date upon which the final tariffs are filed with the Commission. It is, further,

{¶ 33} ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 34} ORDERED, That DP&L notify all customers regarding the availability of the new tariffs via a bill message, via a bill insert, or via a separate mailing within 30 days of the effective date of the tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

GAP/BAM/sc/vrm

Entered in the Journal
AUG 2 6 2018

Barcy F. McNeal
Secretary

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. 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.	CASE NO. 08-1096-EL-AAM
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR WAIVER OF CERTAIN COMMISSION RULES.	CASE NO. 08-1097-EL-UNC

THIRD 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 services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} By Opinion and Order (Order) issued on June 24, 2009, in this case, the Commission adopted the stipulation and recommendation of the parties (Stipulation) to establish DP&L's first ESP (*ESP I*). Included as terms, conditions, or charges in *ESP I* we are a rate stabilization charge (RSC), an environmental investment rider (EIR), and a fuel and purchased power rider. Thereafter, by Entry issued on December 19, 2012, the Commission continued *ESP I*, including the RSC, until a subsequent SSO could be authorized.

{¶ 5} By Order issued on September 4, 2013, the Commission modified and approved DP&L's application for a second ESP (*ESP II*). Included in *ESP II* was a service stability rider (SSR) for DP&L's financial integrity. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving *ESP II* and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, ___Ohio St.3d___, 2016-Ohio-3490, ___N.E.3d___. Subsequently, on July 16, 2016, a mandate from the Supreme Court of Ohio was filed in the *ESP II Case* requiring the Commission to modify its order or issue a new order. Therefore, on August 26, 2016, in the *ESP II Case*, the Commission modified *ESP II* pursuant to the Court's directive and then granted DP&L's application to withdraw *ESP II*, thereby terminating it.

{¶ 6} R.C. 4928.143(C)(2)(b) provides that if the utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized. By Order issued on August 26, 2016, in this case, the Commission granted DP&L's application to implement its most recent SSO, which is *ESP I*, pursuant to R.C. 4928.143(C)(2)(b). Additionally, the Commission directed DP&L to file tariffs to implement *ESP I*.

{¶ 7} 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.

{¶ 8} On September 23 and 26, 2016, applications for rehearing were filed by Ohio Partners for Affordable Energy, Edgemont Neighborhood Coalition (OPAE Edgemont), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Energy Group (OEG), the Ohio Manufacturers' Association (OMA), the Kroger Company (Kroger), and the Ohio Consumers' Counsel (OCC) regarding the Commission's August 26, 2016, Order granting DP&L's application to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b). Thereafter, on October 3 and 6, 2016, DP&L filed memoranda contra to the applications for rehearing.

{¶ 9} 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. We found that sufficient reason was set forth by the parties to warrant further consideration of the matters raised in the applications for rehearing.

{¶ 10} Thereafter, 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

{¶ 11} Initially, the Commission notes that many of the assignments of error raised by the parties are not relevant to this case. Pursuant to R.C. 4928.143(C)(2)(a), "If the Commission modifies and approves an application [for an electric security plan], the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer * * * ". Accordingly, in the *ESP II Case,* DP&L withdrew its application for *ESP*

II, which was granted by the Commission, thereby terminating *ESP II*. *ESP II Case*, Finding and Order (Aug. 26, 2016).

{¶ 12} Additionally, pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, 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." Accordingly, on July 27, 2016, DP&L filed a motion in this proceeding to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b), and then filed proposed tariffs. Therefore, in this case, the Commission is only considering rehearing on its decision to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b). Assignments of error related to DP&L's withdrawal of *ESP II* and the Commission's granting of DP&L's withdrawal, thus terminating *ESP II*, are not relevant to this case and should have been raised in the *ESP II Case*. Likewise, assignments of error related to the service stability rider (SSR) are not relevant to this proceeding. The SSR was authorized in *ESP II* and all issues regarding the SSR should be raised in that proceeding.

{¶ 13} The assignments of error that are not relevant in this case include OPAE Edgemont's first assignment of error, in which OPAE Edgemont argues the Commission unlawfully acted outside the scope of its authority in granting DP&L's application to withdraw ESP II. Additionally, three of the assignments of error raised by OEG are moot or otherwise not relevant in this proceeding. First, OEG argues that the Commission erred by finding the Supreme Court of Ohio reversed the Commission's entire decision in the *ESP II Case*. Second, OEG asserts the Commission erred by allowing DP&L to withdraw and terminate *ESP II*. Third, OEG argues the Commission erred by failing to address OEG's request for a refund of the SSR. Each of these three assignments of error are regarding the Commission's decision to grant DP&L's withdrawal of *ESP II* pursuant to R.C. 4928.143(C)(2)(a).

{¶ 14} Finally, two of the assignments of error raised by IEU-Ohio are moot or otherwise not relevant in this proceeding. First, IEU-Ohio argues the Commission's Order was unlawful or unreasonable for failing to address IEU-Ohio's argument that the Commission should initiate a proceeding to refund the SSR. Second, IEU-Ohio asserts the Commission's Order was unlawful and unreasonable for failing to initiate a proceeding to account for amounts billed and collected under the SSR. Each of these assignments of error relate to *ESP II* and the SSR. Neither *ESP II* nor the SSR were litigated or considered in this case. Accordingly, rehearing is denied on these assignments of error for being moot or otherwise not relevant in this proceeding.

A. *Assignment of Error 1*

{¶ 15} OEG, OMA, and Kroger argue the Commission misapplied R.C. 4928.143(C)(2)(b) by allowing DP&L to recover competitive bid process energy and capacity costs through base generation rates and setting the fuel rider to zero, excluding amounts being reconciled from prior periods. OMA asserts it supports the policy rationale for the Commission's decision to maintain the market-based framework, but is concerned the Order sets a dangerous legal precedent that will enable utilities in future cases to pick provisions across multiple ESPs that they find most favorable.

{¶ 16} DP&L argues the parties ignore several key points: 1) competitive bidding has occurred in DP&L's service territory, and parties have entered into contracts in reliance upon that process; 2) several riders are not impacted by *ESP II* (e.g., Universal Service Rider, Energy Efficiency Rider, Alternative Energy Rider); and 3) DP&L's rates would actually be significantly higher if new rates were implemented exactly how they existed in 2013. Therefore, DP&L argues, granting rehearing on this assignment of error would not be in the public interest. DP&L asserts the Commission should reject this assignment of error. According to DP&L, granting rehearing on this assignment of error would disrupt the competitive market and related contracts, and result in rates that are significantly higher than those proposed by DP&L.

Conclusion

{¶ 17} The Commission finds rehearing on these assignment of error should be denied. R.C. 4928.143(C)(2)(b) provides that if the utility terminates an application for 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, along with any expected increases or decreases in fuel costs from those contained in that offer. *ESP I* is DP&L's most recent SSO, and included in *ESP I* is a "bypassable fuel recovery rider to recover retail fuel and purchased power costs, based on least cost fuel and purchased power being allocated to retail customers." Stipulation (Feb. 24, 2009) at 3. Therefore, allowing DP&L to recover the cost of fuel and purchased power, including energy and capacity obtained though the competitive bidding process, is consistent with the provisions of *ESP I*. Moreover, the Commission authorized DP&L to recover the costs of energy and capacity obtained through the competitive bid process to serve non-shopping customers through base generation rates rather than the fuel and purchased power rider in order to minimize any rate impacts due to the different rate designs implemented in DP&L's legacy base generation rates and the fuel and purchased power rider.

{¶ 18} R.C. 4928.02(G) provides that it is the policy of the state of Ohio to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. We find that such flexible regulatory treatment is absolutely necessary in this instance to protect the public interest, maintain reasonable rates, ensure the integrity of existing contracts, and otherwise protect Ohio's competitive bid process for procuring wholesale power. Accordingly, we refuse to take any action which threatens the integrity of the competitive bid process.

{¶ 19} Further, all of DP&L's non-shopping customers are being served by energy and capacity purchased from the wholesale markets through the competitive bid process. DP&L customers benefit from the lesser rates resulting from the competitive bid process, and we find that the process should be maintained. We held in our Order, and now affirm, that DP&L's proposed tariffs should be approved as the proposed tariffs honor existing contracts with winning competitive bid suppliers and maintain current PJM obligations for all suppliers, for the benefit of customers. Accordingly, rehearing on this assignment of error is denied.

B. *Assignment of Error 2*

{¶ 20} OEG, OMA, Kroger, and IEU-Ohio argue the Commission misapplied R.C. 4928.143(C)(2)(b) by retaining the transmission cost recovery riders from *ESP II*. In *ESP II*, the Commission authorized a bypassable transmission cost recovery rider (TCRR-B) and a nonbypassable transmission cost recovery rider (TCRR-N). IEU-Ohio asserts that regardless of the merit of the rationales offered by the Commission, the Commission is without authority to authorize the continuation of the TCRR-N now that *ESP II* has been terminated. IEU-Ohio avers the Commission is required, pursuant to R.C. 4928.143(C)(2)(b), to restore the fully bypassable TCRR-B, which was one of the provisions, terms, and conditions of *ESP I*. Further, IEU-Ohio argues the Commission is required to comply with its rules, including Ohio Adm.Code 4901:1-36-04(B), which requires transmission riders to be fully bypassable. Finally, IEU-Ohio asserts the TCRR-N is preempted by federal law because it blocks customers from taking service directly under PJM's open access transmission tariff (OATT) and because costs are not allocated and billed in the same manner as required by PJM's OATT.

{¶ 21} DP&L argues the parties ignore that existing competitive retail electric service (CRES) supply contracts, existing SSO auction-winning bids, and related Master SSO Supply Agreements are all premised upon the TCRR-N/TCRR-B structure that was put in place in *ESP II*. These contracts and winning bids assume that transmission costs will be incurred and recovered by DP&L through the TCRR-N. DP&L asserts that if the Commission were to eliminate the TCRR-N, ample lead time would be required to prepare and adjust existing and new contracts.

CONCLUSION

{¶ 22} The Commission finds that rehearing on this assignment of error should be denied. The Revised Code requires the Commission to both return DP&L to *ESP I* and to recognize the emergence of competitive electricity markets through flexible regulatory treatment. We note that R.C. 4928.143(C)(2)(b) requires DP&L to return to *ESP I*, including the terms, conditions, and charges thereof. However, *ESP I* does not prohibit a nonbypassable transmission cost recovery rider. The Stipulation in this case expressly provides that DP&L may apply to the Commission for approval of separate rate riders to recover "TCRR costs" and "RTO costs not recovered in the TCRR." Stipulation (Feb. 24, 2009) at 11. The Stipulation does not address whether such riders should be bypassable or non-bypassable. Therefore, we find that the TCRR-N is authorized by the Stipulation in *ESP I*.

{¶ 23} Further, R.C. 4928.02(G) is clear that the Commission must "recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment." The Commission understands that terminating the TCRR-N could have a disruptive effect on electricity markets and that existing CRES supply contracts were entered into with the expectation that the TCRR-N would continue for the duration of *ESP II*. The TCRR-N was authorized for the duration of *ESP II*, so CRES providers and participants in the competitive bidding process to serve the SSO had a reasonable expectation that the TCRR-N would continue until May 31, 2017. DP&L and IGS each point out that existing CRES contracts, existing SSO auction winning bids, and related Master SSO Supply Agreements are all premised upon the structure of having a non-bypassable transmission cost recovery rider. Those contracts and winning bids assume that transmission costs will be recovered by DP&L through the TCRR-N until May 31, 2017.

{¶ 24} Finally, we find that some of the additional arguments raised by IEU-Ohio lack merit. IEU-Ohio argues the Commission violated its rules, including Ohio Adm.Code 4901:1-36-04(B), which requires transmission riders to be fully bypassable. However, Ohio Adm.Code 4901:1-36-02(B) expressly provides that the Commission may, upon an application or a motion filed by a party, waive any requirement of the chapter, other than a requirement mandated by statute, for good cause shown. Regarding the TCRR-N, such a motion was made by DP&L and granted by the Commission. *ESP II; In re The Dayton Power and Light Co. for Waiver of Certain Commission Rules,* Case No. 12-429-EL-WVR. Additionally, IEU-Ohio argues the TCRR-N is preempted by federal law because it blocks customers from taking service under PJM's open access transmission tariff (OATT) and costs are not allocated and billed in the same manner as required by PJM's OATT. However, the TCRR-N never actually prohibited customers from obtaining transmission services from PJM's OATT.

C. *Assignment of Error 3*

{¶ 25} OMA, Kroger, OPAE Edgemont, OCC, IEU-Ohio, and OEG argue the Commission's Order is unjust or unreasonable because it authorizes DP&L to collect the RSC. They argue that through the RSC, DP&L will unlawfully collect the equivalent of transition revenues, much like the SSR in *ESP II* that was overturned by the Court. The parties assert the Commission should follow the holdings from the Court's decisions to strike down unlawful stability charges. They argue that these stability charges allow utilities to unlawfully collect the equivalent of transition revenues, in violation of R.C. 4928.38. OEG asserts that the Court's citation to the AEP Ohio ESP case can have only one meaning: that DP&L's SSR, which is a financial integrity charge equivalent to AEP Ohio's RSR, provides DP&L with unlawful transition revenue and is barred by R.C. 4928.38. Similarly, OCC accuses the Commission of ignoring the Court's opinion.

{¶ 26} OMA and Kroger then assert that DP&L's provider of last resort (POLR) obligations are not a legitimate justification for the RSC. They argue that since DP&L is not currently providing POLR services, it should not be permitted to collect costs that are intended to compensate it for providing that function. OMA and Kroger argue the Commission's justification of the RSC as a legitimate POLR charge is misplaced. They argue that auction participants provide POLR services because of their commitment to supply power through the competitive bid process. OMA and Kroger aver that if DP&L is not currently providing the POLR function, it should not be permitted to collect costs that are intended to compensate it for providing that function.

{¶ 27} OPAE Edgemont argues the ESP, including the RSC, expired on December 31, 2012, pursuant to the terms of the Stipulation. *ESP I*, Opinion and Order at 5. Therefore, since the RSC expired, it is no longer a term, condition, or charge in *ESP I*.

{¶ 28} DP&L argues that the RSC is a lawful charge, agreed to by the parties, and implemented by the Commission. DP&L asserts that R.C. 4928.143(C)(2)(b) requires the Commission to implement "the provisions, terms, and conditions of the utility's most recent standard service offer." There is no dispute that *ESP I* is DP&L's most recent SSO. Further, there is no dispute that the RSC was a term of *ESP I*. Therefore, DP&L argues, the Commission properly authorized DP&L to implement the RSC as a term of its most recent SSO, pursuant to R.C. 4928.143(C)(2)(b).

{¶ 29} DP&L then argues that the parties' arguments are barred by R.C. 4903.10(B) and the doctrines of res judicata and collateral estoppel. DP&L notes that no party in this case sought rehearing of the Commission decision approving the Stipulation, and no party appealed the decision. It is well settled, and expressly provided in R.C. 4903.10(B), that a party cannot challenge a decision if it did not seek rehearing of that decision. Further, the intervenors arguments are also barred by the doctrines of collateral estoppel (issue preclusion) and res judicata (claim preclusion). "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." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶6 (2007). "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." *O'Nesti* at ¶7. "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). Further, "the 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). DP&L asserts that collateral estoppel applies to arguments that could have been brought in an earlier action. In this case, R.C. 4928.39 was in effect at the time *ESP I* was filed and litigated, and parties could have raised their arguments at the time but did not. DP&L asserts that since no party challenged the Commission's decision in *ESP I*, the intervenors are barred by the doctrines of res judicata and collateral estoppel from challenging the lawfulness of the RSC.

{¶ 30} OMA and Kroger assert that the doctrines of res judicata and collateral estoppel do not apply here. They argue that where "there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in a later action." *State ex. rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 45, 529 N.E.2d 1255 (1988). Similarly, OCC argues the Commission's Order is unjust or unreasonable because the Commission held that parties were precluded from re-litigating the RSC due to the doctrines of res judicata and collateral estoppel.

CONCLUSION

{¶ 31} The Commission finds the arguments in support of the assignment of error lack merit. Accordingly, rehearing on this assignment of error should be denied. DP&L's *ESP I* was approved by the Commission's adoption of a Stipulation signed by the parties to this case, including OCC, IEU-Ohio, OMA, Kroger, and OPAE. *ESP I*, Opinion and Order (June 24, 2009) at 13. The Stipulation, which includes the RSC, was adopted by the Commission after holding a hearing and providing parties the opportunity to fully litigate this case. No party argued that the Stipulation did not meet the Commission's three-prong test for review of a stipulation. The parties agreed that 1) the settlement was the product of serious bargaining among capable, knowledgeable parties; 2) the settlement, as a package, benefits ratepayers and the public interest; and 3) the settlement package does not violate any important regulatory principle or practice. *Stipulation* (Feb. 24, 2009) at 1-2. The Stipulation states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Stipulation (Feb. 24, 2009) at 17-18.

{¶ 32} With respect to claims that the RSC violates R.C. 4928.38, the Commission notes that, instead of challenging or appealing the RSC as a violation of R.C. 4928.38, the parties signed "a complete settlement of all claims, defenses, issues, and objects." Stipulation (Feb. 24, 2009) at 17-18. The parties chose not to argue at the time that the RSC did not benefit ratepayers or the public interest, that it violated an important regulatory principle or practice, or that it violated R.C. 4928.38. When the Commission approved *ESP I*, R.C. 4928.38 prohibited the collection of transition revenues, yet no party opposed the Stipulation or appealed *ESP I* to the Court. If the parties believed the RSC unlawfully allowed DP&L to collect the equivalent of transition revenues, they had ample opportunity to oppose the stipulation or to appeal the matter to the Court. They did neither.

{¶ 33} Further, the doctrines of res judicata and collateral estoppel prohibit parties from relitigating the RSC. The RSC is a term, condition, or charge of *ESP I* that was litigated along with the rest of *ESP I*. "Collateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings." *Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908. Collateral estoppel, otherwise known as issue preclusion, prohibits the parties from relitigating the RSC in this case.

{¶ 34} Further, the Commission subsequently addressed the question of whether the RSC violates R.C. 4928.38. We determined on December 19, 2012, in this proceeding, that "the

RSC is a provider of last resort (POLR) charge and not a transition charge * * *." Entry (Dec. 19, 2012) at 4. No party filed an application for rehearing regarding that ruling. Therefore, the assignments of error claiming that the RSC is an unlawful transition charge constitute an untimely application for rehearing to our December 19, 2012 Entry and are barred by R.C. 4903.10.

{¶ 35} Finally, the RSC has already been affirmed by the Court. On December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved rate stabilization surcharge into two separate components: (1) the RSC; and (2) an environmental investment rider (EIR). As noted above, the RSC was authorized to pay DP&L for costs associated with its POLR obligations. The Commission determined in Case No. 05-276-EL-AIR, that the RSC and EIR were both fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). The parties then appealed the Commission's decision, including the RSC. The Supreme Court of Ohio affirmed the Commission's decision and upheld both the RSC[1] and the EIR. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276. Accordingly, we find the assignment of error lacks merit, is barred by the doctrines of res judicata and collateral estoppel, and should otherwise be denied.

D. *Assignment of Error 4*

{¶ 36} 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 application for rehearing, were clear and the Commission should have granted rehearing. Similarly, OCC argues that the Commission erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, OCC argues, the Commission failed to fulfill its duty to hear matters pending before it without

1 Although the Court upheld the RSC, it remanded the matter to the Commission to remove the RSC from DP&L's distribution tariffs and place it in DP&L's generation tariffs. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 at *349-350, ¶41.

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 right to appeal a Commission order, which is a right established, inter alia, under R.C. 4903.10, 4903.11, and 4903.13.

{¶ 37} 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 is 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

{¶ 38} The Commission finds that the assignment of error lacks merit and 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. However, as we discussed above, OCC's assignments of error lack merit and we have denied rehearing on those assignments of error. The Commission's Order issued on August 26, 2016 is required by R.C. 4928.143(C)(2)(b), which provides that the Commission shall implement "the provisions, terms, and conditions of the utility's most recent standard service offer." Further, there has been no unreasonable delay in this case, and no party has been prejudiced by the Commission's granting of rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing.

IV. ORDER

{¶ 39} It is, therefore,

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

{¶ 41} 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 1 4 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

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 Section 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

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Maureen Willis
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APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") files this application to protect customers from paying another illegal subsidy to the Dayton Power and Light Company ("DP&L"). Like DP&L's so called "stability" charge the Ohio Supreme Court recently struck down,[1] the "Rate Stabilization Charge" that the PUCO recently authorized is an unlawful transition charge that Ohio law precludes.

[1] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

In its Opinion and Order of August 26, 2016, the Public Utilities Commission of Ohio ("PUCO") granted DP&L's motion to implement the provisions of its first electric security plan ("ESP") until a subsequent standard service offer is authorized by it. This order was made in conjunction with an order allowing DP&L to withdraw and terminate its ESP application.[2]

The Opinion and Order was unreasonable and unlawful in the following respects:

ASSIGNMENT OF ERROR 1: The PUCO unlawfully and unreasonably approved DP&L's request to collect a rate stabilization charge ("RSC") from customers as part of continuing DP&L's most recent standard service offer. The RSC charge permits the Utility to collect an unlawful transition charge or equivalent revenues, violating R.C. 4928.38, 4928.39, and 4928.40.

ASSIGNMENT OF ERROR 2: The PUCO unlawfully and unreasonably permitted DP&L to implement a stability charge in direct violation of the Ohio Supreme Court's recent order.

ASSIGNMENT OF ERROR 3: The PUCO unlawfully and unreasonably ruled that parties were precluded from re-litigating the retail stability charge due to the doctrines of res judicata and collateral estoppel.

A. The retail stability charge was not actually and directly litigated in prior proceedings.

B. The PUCO's holding is unreasonable because it is contrary to the principle that the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

ASSIGNMENT OF ERROR 4: The PUCO unreasonably and unlawfully approved DP&L's request to collect a rate stabilization charge as a provider of last resort ("POLR") obligation.

A. The PUCO erred by charging customers now for POLR service that DP&L is not currently providing.

[2] See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Finding and Order (Aug. 26, 2016).

B. There is no evidentiary support for allowing DP&L to charge customers $76 million per year for POLR when DP&L does not currently provide POLR service.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

At a time when 500,000 customers of Dayton Power and Light Company ("DP&L" or "Utility") should be receiving long overdue rate decreases, the PUCO has allowed DP&L to avoid fully reducing rates to customers. Since January 1, 2014, DP&L has taken approximately $285 million in subsidies from customers in the Dayton area--where there is financial distress, a poverty level of 35%, and insecure access to food[3]--through its inaptly named service stability charge ("Rider SSR").

[3] Map the Meal Gap 2016. Feeding America http://www.feedingamerica.org/hunger-in-america/our-research/map-the-meal-gap/data-by-county-in-each-state.html?referrer=https://www.google.com/.

The Supreme Court ordered the PUCO to carry out its judgment that Rider SSR is an unlawful transition charge that DP&L's customers should not be paying.[4] But instead of complying with the Supreme Court decision and eliminating the $10 per month stability charges to customers, the PUCO allowed DP&L to terminate its plan and continue its prior ESP rates (ESP II). Under those rates, DP&L will be collecting more unlawful stability charges -- this time charging customers $6.05 per month ($76 million per year) in above-market transition charges.

The PUCO's Order permitting DP&L to collect a rate stabilization charge is unlawful. Rehearing should be granted.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on October 27, 2008, which was granted by Entry dated February 5, 2009. OCC also filed testimony regarding the Application and participated in the evidentiary hearing on the Application.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states:

[4] See *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO et al., Supreme Court mandate (July 19, 2016).

"An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "[i]f, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed."

The statutory standard for abrogating some portions of the Order and modifying other portions is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Opinion and Order of August 2, 2016.

III. ERRORS

ASSIGNMENT OF ERROR 1: THE PUCO UNLAWFULLY AND UNREASONABLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE ("RSC") FROM CUSTOMERS AS PART OF CONTINUING DP&L'S MOST RECENT STANDARD SERVICE OFFER. THE RSC CHARGE PERMITS THE UTILITY TO COLLECT AN UNLAWFUL TRANSITION CHARGE OR EQUIVALENT REVENUES, VIOLATING R.C. 4928.38, 4928.39, AND 4928.40.

The PUCO approved DP&L's request to implement a rate stabilization charge as part of continuing its standard service offer rates. In approving the charge, the PUCO relied upon its 2012 Opinion and Order, adopting a stipulation with the rate stabilization charge. There, the PUCO maintained that it determined "that the RSC and EIR were both fair, reasonable and supported by the record."[5] The PUCO also claims that in its subsequent decision, it approved another stipulation that continued the stability charge (and the EIR) finding them to be a "valid provision, term, or condition of [DP&L's] ESP I."[6]

But the PUCO fails to acknowledge that since its earlier holdings approving stipulations that included the rate stabilization charge (RSC), the Ohio Supreme Court has struck down two similar stability charges.[7] The stabilization charge here is, like the other illegal stability charges, an unlawful transition charges.

The rate stabilization charge was paid by customers starting on January 1, 2007.[8] The charge was originally described (in 2003) as relating to increased costs of production, physical security, and cybersecurity for power plants owned by DP&L and its affiliates.[9] In this case, parties stipulated to extend DP&L's rate plan through December 31, 2012 and continue the RSC as a non-bypassable charge to customers.[10]

In 2012 when DP&L filed its application for a market rate offer, it sought to continue its RSC charge but decided to change the name to an "electric service stability charge (ESSC)." In its application it noted that the ESSC charge would "equal the rate

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[5] *In the Matter of the Application of the Dayton Power & Light Co. too Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Finding and Order at ¶5 (Aug. 26, 2016).

[6] Id. at ¶25.

[7] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016); *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

[8] *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005)(adopting Stipulation with rate stabilization charge).

[9] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Stipulation at 13-14 , ¶IX E (May 28, 2003).

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

formerly charged as the rate stabilization charge."[11] DP&L described the rate as compensating the company "for maintaining electric service stability for the Company and its customers."[12]

Later that year, DP&L withdrew its application for a market rate offer, and filed an ESP with a "service stability rider" to "ensure the Company's financial integrity."[13] That proposed service stability charge was essentially no different than the earlier RSC/ESSC stability charges. The service stability charge was the very same charge that the Ohio Supreme Court struck down as an unlawful transition charge.[14]

The "RSC" charge the PUCO recently reinstituted is a transition charge designed to subsidize DP&L and its power plants. The RSC, arbitrarily set at 11% of the costs of DP&L's power plants, will collect $76 million a year from customers.[15] But under the law (R.C. 4928.38, 4928.39 and 4928.40), following the market development period, DP&L is supposed to be "fully on its own in the competitive market." The market development period ended for DP&L in 2005. There should be no more above-market subsidies paid by customers to support generation in Ohio.

The law prohibits the PUCO from approving the collection of transition revenues or "equivalent revenues" from DP&L's customers after 2005. The recent Supreme Court precedent[16] affirmed this when it struck down both AEP Ohio's and DP&L's stability

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[11] *In the Matter of the Application of the Dayton Power & Light Company for Approval of its Market Rate Offer,* Case No. 12-426-EL-SSO et al., Application at 9 (Mar. 30, 2012).

[12] Id.

[13] Id. at 7. At the same time it proposed to withdraw the smaller RSC charge.

[14] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

[15] Id., Opinion and Order at 11 (Dec. 28, 2005).

[16] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016); *In re: Application of Columbus S. Power Co.,* Slip Op. No. 2016-Ohio-1608.

charge.[17] The PUCO should abrogate its earlier ruling approving the RSC, given the Court's recent rulings.[18] Rehearing should be granted, and the PUCO should reject the RSC charge because it is an unlawful transition charge.

ASSIGNMENT OF ERROR 2: THE PUCO UNLAWFULLY AND UNREASONABLY PERMITTED DP&L TO IMPLEMENT A STABILITY CHARGE IN DIRECT VIOLATION OF THE OHIO SUPREME COURT'S RECENT ORDER.

Less than three months ago the Ohio Supreme Court struck down DP&L's stability charge finding it to be an unlawful transition charge, violating R.C.4928.39. That should have meant that customers would no longer be paying for unlawful transition charges. But the PUCO then turned around and permitted the utility to reimplement stability charges that are no different than those the Court struck down. The PUCO ignored the Court's ruling. The PUCO's actions are both unreasonable and unlawful. The PUCO did not fulfill the Court's mandate. That was unlawful under R. C.4903.13. The Ohio Supreme Court reversed. A mandate was issued. The PUCO's actions failed to properly carry out the Court's mandate. Additionally, it was unreasonable for the PUCO to circumvent the Court's order. Rehearing should be granted.

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[17] Id.

[18] See *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted)(affirming that the PUCO can modify earlier Orders so long as the PUCO explains the change and the new regulatory course is permissible).

ASSIGNMENT OF ERROR 3: THE PUCO UNLAWFULLY AND UNREASONABLY RULED THAT P WERE PRECLUDED FROM RE-LITIGATING THE RETAIL STABILITY CHARGE DUE TO THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

A. The retail stability charge was not actually and directly litigated in prior proceedings.

The doctrine of res judicata (and collateral estoppel) is applicable to administrative proceedings, including those of the Commission. *In the Matter of the Complaint of Union Rural Electric Cooperative, Inc., Complainant, v. The Dayton Power and Light Company, Respondent, Relative to an Alleged Violation of the Ohio Electric Suppliers Certified Territory Act* ("*Alleged Violation*"), Case No. 88-947-EL-CSS, 1988 Ohio PUC LEXIS 776, Entry at 7 (August 16, 1988). Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action. *Thompson v. Wing*, 70 Ohio St.3d, 176, 183 (1994).

And although the PUCO can choose to apply the doctrine of collateral estoppel, it must do so carefully especially when the prior proceeding was one in which the PUCO was analyzing a settlement. A settlement, under the PUCO's review, is adjudicated as a package, not by way of the individual terms within the package. The mere fact that the prior settlement contained a stability provision does not mean that the stability provision itself was actually and directly litigated, thereby invoking collateral estoppel. Indeed, the PUCO did not (and cannot cite) to any finding that the retail stability charge itself was determined to be a reasonable, permissible provision of an electric security plan under Ohio law.

The PUCO has in the past rejected collateral estoppel claims made pertaining to a settlement, insisting that the prior settlement must specifically address the issue: "In the absence of a specific provision addressing the issue in the RSP [Settlement], OCC has not shown that this issue has been actually and necessarily litigated in the prior action; therefore, collateral estoppel does not preclude DP&L from filing the application in this proceeding."[19] The PUCO's holding here should be consistent with this prior ruling. Neither of DP&L's settlements specifically addressed the reasonableness of the stability charge. And neither settlement addressed whether the charge is a permissible provision of an electric security plan under Ohio law. Because the issue was not actually and necessarily litigated in the prior PUCO proceedings, collateral estoppel does not apply. The PUCO erred. Rehearing should be granted.

B. The PUCO's holding is unreasonable because it is contrary to the principle that the PUCO can modify earlier orders so long as it explains the change and the new regulatory course is permissible. *In re: Application of Ohio Power Co.,* 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted).

The PUCO ruled that the parties' arguments against the stability charge are barred by doctrines of res judicata and collateral estoppel. The PUCO's ruling is wrong.

The PUCO has the discretion to change or alter its prior decisions.[20] The Ohio Supreme Court has on a number of occasions explained that the PUCO *can* revisit a

[19] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with a Request to Implement a PJM Administrative Fee*, No. 05-844,-EL-ATA, Entry on Rehearing at ¶8 (Mar. 7, 2008).

[20] See, e.g., *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17 (citations omitted)(affirming that the PUCO can modify earlier Orders so long as the PUCO explains the change and the new regulatory course is permissible).

particular decision, but must, if it changes course, explain why.[21] The PUCO's power to change course is not limitless; it must explain why and the new course must be substantively reasonable and lawful.[22]

Here due to the Ohio Supreme Court recent decisions striking down stability charges (including DP&L's), it is reasonable for the PUCO to revisit its earlier decisions approving a very similar, if not identical, stability charge for DP&L. And excluding stability charges from a utility's electric security plan rates is reasonable and lawful, as the Ohio Supreme Court has recently ruled against such charges.[23]

The PUCO itself has recognized the doctrine of collateral estoppel does not impede its ability to alter its prior decisions. In an earlier PUCO case, in response to claims by OCC that collateral estoppel should prevent the utility (DP&L) from relitigating issues previously decided, the PUCO rejected OCC's claims:

> The Commission notes that the doctrine of collateral estoppel relates to the ability of litigants to bring actions that would relitigate matters that have already been decided. It does not relate to the ability of the court or an administrative agency to alter prior decisions. Thus, to the extent that the opinion and order alters the outcome of the ETP and MDP cases, collateral estoppel is irrelevant to the Commission's determination.[24]

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[21] *In re: Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, citing, e.g., *Util. Serv. Partners Inc. v. Public Util. Comm.*, 124 Ohio St.3d 284; *Ohio Consumers Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51.

[22] Id.; see also *Fed. Communications Comm. V. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." [emphasis deleted].

[23] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016). (rejecting DP&L's stability charges which are very similar to the stability charges the PUCO approved in going back to DP&L's prior rates). See also *In re: Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608.

[24] *In the Matter of the Complaint of Dominion Retail, Inc. v. The Dayton Power & Light Company*, Case No. 03-2405-EL-CSS, et al., Entry on Rehearing at ¶10 ((Mar. 23, 2005). On appeal, the Court upheld the PUCO's modification of its earlier order. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio Sat. 3d 394, 2006-Ohio-4706.

Changing course or altering prior decisions to account for changes in facts and circumstances is something the PUCO should embrace, not run from. The PUCO has a duty to ensure just and reasonable rates for Ohioans, and must be flexible in reviewing its prior determinations. "[Res judicata] is not always applied in the same manner in administrative proceedings as in the courts, given the nature of ongoing regulatory responsibility of administrative agencies and their need to take into account changes in facts and circumstances in determining what is in the public interest at a particular point in time." *Alleged Violation*, Entry at 7.

It was unreasonable for the PUCO to apply res judicata to prevent it from taking what now are known to be unlawful charges out of customers' rates. Rehearing should be granted.

ASSIGNMENT OF ERROR 4: THE PUCO UNREASONABLY AND UNLAWFULLY APPROVED DP&L'S REQUEST TO COLLECT A RATE STABILIZATION CHARGE AS A PROVIDER OF LAST RESORT ("POLR") OBLIGATION.

A. The PUCO erred by charging customers now for POLR service that DP&L is currently not providing those customers.

The PUCO found that the stability charge is a non-bypassable provider of last resort charge (POLR) to allow DP&L to fulfill its POLR obligations.[25] The PUCO reasoned that even though POLR service is being provided by marketers during the ESP term, DP&L retains its obligation, "over the long term," to serve as provider of last resort. In this regard the PUCO notes that even though POLR service is being provided by competitive bidding process auction participants, there are no further competitive auctions schedule to procure energy and capacity after May 31, 2017. And it states that

[25] *In the Matter of the Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 08-1094-EL-SSO et al., Finding and Order at ¶23 (Aug. 26, 2016).

DP&L maintains a long term obligation to serve as POLR even while POLR service are being provided by competitive bidding auction participants in the short term.

But the PUCO has approved increased rates for customers (starting Sept. 1, 2016) that charge customers for POLR service that DP&L is not providing. As the PUCO noted, that service is being provided by the auction participants from now until at least May 31, 2017.[26] Allowing DP&L to charge customers now, for possible POLR service it may or may not provide after May 31, 2017, is unreasonable and unlawful. Rehearing should be granted on this issue.

B. There is no evidentiary support for allowing DP&L to charge customers $76 million per year for POLR when DP&L does not currently provide POLR service to those customers.

The PUCO has ruled that POLR charges must be justified either on a cost basis or a non-cost basis before a utility can be compensated for being the POLR and carrying the risks associated with being the POLR.[27] The PUCO has further defined those risks to exclude migration risk, but include risks associated with standing ready to accept returning customers.[28]

DP&L's RSC charge has not been justified as a POLR charge. At no stage during any of the prior proceedings, and at no time in DP&L's recent filing, did the Utility produce any cost based evidence related to POLR costs or the risks it bears associated with being the POLR. Obviously it could not do so, because the costs (or the obligation) do not exist for it during the remaining ESP term (September 2016 through May 31,

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[26] Id.

[27] *In the Matter of the Ohio Power Company*, Case No. 08-917-EL -SSO, Opinion and Order at 40 (Mar. 18, 2009).

[28] *In the Matter of the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

2017). DP&L is not providing POLR service. Instead the winning bidders in the SSO auction are providing that service and the rates customers pay likely reflect that POLR risk and/or cost.

And while POLR charges do not necessarily have to reflect cost, if they are non-cost based, they must be shown to be reasonable.[29] DP&L's POLR charge, established in 2005, was arbitrarily set at 11% of the standard service offer rate as of January 2014.[30] DP&L, through the testimony of Kurt Strunk, tried to justify the POLR charge by presenting a Black Scholes analysis. Mr. Strunk testified that the value to customers of the option to switch on and off DP&L's standard offer rate exceeded the rates being charged.[31]

Putting aside the PUCO's past findings rejecting the use of Black Scholes modeling for justifying POLR charges,[32] the PUCO should conclude that there is no record to support DP&L charging customers for service that is not being provided. Here the record lacks sufficient and probative evidence to support charging customers for a POLR service that is not being provided by DP&L to its customers who are being asked to pay the charge. It is reversible error, under R.C. 4903.09, for the PUCO to make a decision that is not supported by findings of fact and reasons. Consistent with R.C. 4903.09, the PUCO should grant rehearing.

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[29] Id. at 22.

[30] *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order at 2 (Dec. 28, 2005) ("*RSC Case*"); *see also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶4.

[31] In *the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR,Testimony of Kurt G. Strunk in Support of the Stipulation and Recommendation at 2 (Nov. 4, 2005).

[32] *In the Matter of the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand at 32 (Oct. 3, 2011).

IV. CONCLUSION

The PUCO erred when it permitted DP&L to charge customers another illegal subsidy that is aimed at protecting the utility's financial integrity. Like DP&L's so-called "stability" charge the Ohio Supreme Court recently struck down,[33] the "Rate Stabilization Charge" that the PUCO authorized on August 26, 2016 is also an unlawful transition charge that Ohio law precludes. To protect consumers from paying more unlawful charges, the PUCO should grant rehearing on this matter.

Respectfully submitted,

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[33] *In re: Application of Dayton Power & Light Co.*, Slip. Op. No. 2016-Ohio-3490, S.Ct. Case No. 2014-1505 (June 20, 2016).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 26th day of September 2016.

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Attachment A
Residential Customer Impact of DP&L Proposal

Rider Being Eliminated[34]	Cost Per Month[35]
Service Stability Rider	$9.85

Riders Being Reinstated	Cost Per Month
Environmental Investment Rider	$11.87
Rate Stability Charge	$6.05
Total	**$17.92**
Total Net Impact	**$8.07**

[34] Based on a typical residential customer using 1,000 kWh per month.

[35] Although DP&L proposes to eliminate the Competitive Bid True up rider ($5.49/month), DP&L has stated that, at the end of the period the tariffs are in place, the Standard Offer Generation rates will be trued-up to the actual auction supply costs. This results in only a deferral, not a total elimination of this Rider.