BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	: :	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	: :	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13.	: :	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	: :	Case No. 08-1097-EL-UNC

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO MOTION TO REJECT DP&L'S TARIFFS

I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel ("OCC"), The Ohio Manufacturers' Association Energy Group ("OMA") and The Kroger Company ("Kroger") (collectively, "Joint Movants") ask the Commission to reject the request by The Dayton Power and Light Company ("DP&L") to implement the Rate Stabilization Charge ("RSC") following the withdrawal of its Electric Security Plan pursuant to R.C. 4928.143(C)(2)(a). As demonstrated below, the principal defect in that argument is that the Joint Movants entirely ignore R.C. 4928.143(C)(2)(b), which provides that the Commission "shall" implement the terms and conditions of DP&L's most recent

Standard Service Offer ("SSO"). It is undisputed that the RSC was a term of DP&L's most recent SSO, so the Commission should reject their argument.

The Joint Movants also assert that the Commission should reject DP&L's request to implement riders that were established in DP&L's third Electric Security Plan ("ESP III"). As demonstrated below, the Commission should reject that argument because those riders are lawfully based on independent legal authority, including DP&L's ESP I case and DP&L's distribution rate case.

II. THE COMMISSION IS REQUIRED BY R.C. 4928.143(C)(2)(b) TO IMPLEMENT THE RSC

A. The Joint Movants Ignore the Governing Statute

The Joint Movants argue that the Commission should not allow DP&L to recover the RSC following DP&L's termination of its Application in Case No. 16-0395-EL-SSO, et al., pursuant to R.C. 4928.143(C)(2)(a). The principal defect in their argument is that they ignore the governing statute.

R.C. 4928.143(C)(2)(b) establishes what the Commission "shall" do after a utility exercises its right to withdraw and terminate its ESP Application under R.C. 4928.143(C)(2)(a). That section mandates that:

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

Accord: DP&L ESP II, Aug. 26, 2016 Finding and Order, ¶ 14 (Case No. 12-426-EL-SSO, et seq.) ("The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to . . . accept the withdrawal of ESP II.").

"Shall" is mandatory. E.g., Dorrian v. Scioto Conservancy Dist., 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971). The Commission must issue a new Order continuing the provisions, terms, and conditions of DP&L's Standard Service Offer that was in effect when the Commission approved the Stipulation in Case No. 16-395-EL-SSO, et seq., i.e., the rates in effect in ESP I pursuant to the August 26, 2016 Finding and Order issued in 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, et al., Case No. 08-1094-EL-SSO, et al.

The Joint Movants acknowledge (p.2) that DP&L seeks to have the RSC implemented pursuant to R.C. 4928.143(C)(2)(b), but they otherwise ignore that governing statute. They do not cite to it in their argument related to the RSC. They do not contest that the RSC was a provision or term of DP&L's most recent SSO. They do not contest that the word "shall" is mandatory.

The Joint Movants also ignore the fact that after DP&L withdrew ESP II and reverted to ESP I, the Commission held that it was obligated to implement the terms of ESP I, including the RSC. Aug. 26, 2016 Finding and Order, ¶ 23 (Case No. 08-1094-EL-SSO; Dec. 14, 2016 Third Entry on Rehearing, ¶¶ 31-35 (Case No. 08-1094-EL-SSO).

Significantly, despite ignoring R.C. 4928.143(C)(2)(b) in their arguments regarding the RSC in this case, the Joint Movants have admitted elsewhere that R.C. 4928.143(C)(2)(b) requires the Commission to implement ESP I. For example, in their motion (p. 13), the Joint Movants say that "[b]y statute, the Commission is limited to authorizing a return to the EDU's most recent ESP. . . ."

Further, in OCC's Merit Brief that it filed with the Supreme Court in DP&L's ESP II case (Supreme Court Case No. 2017-241), OCC told the Court:

> "The language in the statute is not optional. The word 'shall' is to be construed as mandatory, unless clear and unequivocal legislative intent connotes that it receives a construction other than its ordinary usage.
>
> With no evidence that the legislative intent was for a different construction, the court must construe 'shall' as mandatory. <u>The General Assembly used the word 'shall' leaving the PUCO no choice but to return to 'the utility's most recent standard service offer</u>.'"

May 16, 2017 Merit Brief of Appellant The Office of the Ohio Consumers' Counsel, p. 19 (Sup. Ct. Case No. 2017-241) (citations omitted) (emphasis added). That is exactly right -- the Commission has no discretion but to return to the most recent standard service offer.

Similarly, OMA and Kroger stated:

> "R.C. 4928.143(C)(2)(b) provides that if a utility terminates its ESP application the '[C]ommission 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 * * *.' <u>There is no uncertainty with that provision</u>. By statute, the Commission is limited to authorizing a return to the utility's most recent ESP together with necessary fuel-cost adjustments. Where a statute is unambiguous, it must be enforced according to its terms. Applying that interpretive principle, <u>the Commission should have concluded that its powers under R.C. 4928.143(C)(2)(b) were limited to authorizing DP&L to implement the provisions, terms, and conditions of its ESP I after a lawful withdrawal</u> . . ."

May 15, 2017 Merit Brief of Appellants The Kroger Company and The Ohio Manufacturers' Association, p. 19 (Supreme Court Case No. 17-204) (citations omitted) (emphasis added). Again, that is exactly right.

In short, the Joint Movants have ignored the statute and Commission decisions that are exactly on point and control here. The language is mandatory, and the Commission is required by law to implement the RSC.

B. The Joint Movants Are Barred from Challenging the RSC

The Joint Movants are barred by the rehearing statute and the doctrines of res judicata and collateral estoppel from challenging the RSC. Specifically, on February 24, 2009, DP&L filed a Stipulation with the Commission in ESP I, which was signed by OCC, OMA and Kroger (among others). Feb. 24, 2009 Stipulation and Recommendation, ¶ 3 (Case No. 08-1094-EL-SSO). That Stipulation contained the RSC. Id. The Commission approved that Stipulation. June 24, 2009 Opinion & Order, p. 13 (Case No. 08-1094-EL-SSO).

Section 4928.143(C)(2)(b) was in place in 2009 when OCC, OMA and Kroger signed that ESP I Stipulation. They were on notice that DP&L had the right to reinstate ESP I if the Commission were to modify and approve subsequent ESPs.

No party to the ESP I case sought rehearing of the Commission's decision approving the ESP I Stipulation, and no party appealed that decision. A party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

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

When DP&L withdrew ESP II and reverted back to ESP I, the Commission held that the parties were barred from relitigating the lawfulness of the RSC:

> "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.
>
> 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."

Dec. 14, 2016 Third Entry on Rehearing, ¶¶ 32-33 (Case No. 08-1094-EL-SSO).

Here, OCC, OMA and Kroger had the opportunity to litigate whether the RSC was lawful in ESP I in 2009. Instead, they signed a Stipulation and agreed to the RSC, knowing that DP&L would have the right under R.C. 4928.143(C)(2)(b) to reinstate the RSC if the Commission modified DP&L's next ESP application. OCC, OMA and Kroger are thus barred by R.C. 4903.10, res judicata and collateral estoppel from challenging the RSC now.

C. Even if R.C. 4928.143(C)(2)(b) Did Not Require That the RSC be Implemented, the RSC Would Still be Lawful

As demonstrated above, the Commission must implement the RSC pursuant to R.C. 4928.143(C)(2)(b). This section of DP&L's opposition assumes for the sake of argument that R.C. 4928.143(C)(2)(b) does not mandate that the RSC be implemented, and demonstrates that the arguments by the Joint Movants regarding the RSC are wrong.

1. The Joint Movants ignore two rulings by the Court that the RSC is lawful

Continuing their pattern of ignoring controlling law that is adverse to their position, the Joint Movants fail to distinguish the two Supreme Court cases that have held that DP&L's RSC is lawful. Constellation NewEnergy v. Pub. Util. Comm. of Ohio, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶¶ 39-40; Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶ 17-26.

Specifically, the RSC (sometimes called the Rate Stabilization Surcharge ("RSS")) actually was established six years and two cases before the ESP I case. In 2003, it was included in a Stipulation and Recommendation that was approved by the Commission. May 28, 2003 Stipulation and Recommendation, ¶ IX.E. (Case No. 02-2779-EL-ATA). That Stipulation provided that the RSC would be implemented in a subsequent case. Id. An intervenor in that 2003 case appealed that Commission decision to the Supreme Court, and argued that the RSC was not lawful. The Court rejected that argument:

> "The commission specifically found: '[A]n RSS is reasonable and legally sustainable * * *. As to the issue of whether the RSS should apply to all customers, whether or not they purchase their generation from DP&L, the Commission would note, initially, that representatives of all customer groups agreed, in the stipulation, with charging the RSS to all customers. In addition, the

> Commission finds it is reasonable for DP&L to argue that it will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS. While the Commission is not finding that the costs specified in the stipulation as the basis for the RSS are POLR costs, the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers.'
>
> Constellation disputes both of the justifications the commission gave for approving the RSS mechanism. However, Constellation's arguments lack substance and are unconvincing. The record supports the commission; it does not support Constellation. <u>Thus, we find no error in the commission's findings as to the RSS mechanism</u>."

<u>Constellation</u>, 2004-Ohio-6767, ¶ 39-40 (emphasis added).

The RSC was later implemented in a 2005 Commission case, which was also resolved via a Stipulation and Recommendation that was approved by the Commission. Nov. 3, 2005 Stipulation and Recommendation, ¶ I.C. (Case No. 05-276-EL-AIR). OCC appealed that Commission decision to the Supreme Court, but the Court again held that the RSC was lawful:

> "OCC maintains that the commission erred when it approved a distribution-service rate increase to compensate DP&L for costs that are purely generation-service costs. <u>The commission's approval of the rate and amount is in conformity with applicable law</u>. . . .
>
> In the MDP-extension stipulation in 2003, DP&L proposed a rate-stabilization surcharge, which was intended to allow DP&L to increase rates in order to recover increases in generation-related costs for fuel, for actions taken in compliance with environmental and tax laws and for physical security and cyber security. These increased costs were to be collected from all customers, whether they purchased generation service from DP&L or from another supplier. With respect to those customers who do not take generation service from DP&L, <u>the rate-stabilization surcharge would compensate DP&L for the risks and costs that DP&L will incur as a POLR</u>. See R.C. 4928.14(C).
>
> * * *

> . . . . Accordingly, the PUCO's order is affirmed with regard to the amount of the charge . . ."

Ohio Consumers' Counsel, 2007-Ohio-4276, ¶ 17-18, 26 (emphasis added).

The Joint Movants' reliance (p. 8, n.30) on the Court's decision in In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (2011) is misplaced. In that case, the Court found that "no evidence supports the commission's characterization of [AEP's POLR] charge as based on cost." Id. ¶ 29. However, the Court made clear that it expressed "no opinion" on whether AEP could support its POLR charge with actual evidence:

> "On remand, the commission may revisit this issue. To be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non-cost-based POLR charge is reasonable and lawful. Alternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs. However the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."

Id. ¶ 30 (emphasis added).

Unlike the AEP POLR charge, the Court twice found that DP&L's RSC was supported by the evidence and was lawful. Constellation NewEnergy, 2004-Ohio-6767, ¶¶ 39-40; Ohio Consumers' Counsel, 2007-Ohio-4276, ¶¶ 17-26. The In re Application of Columbus S. Power case is thus inapplicable.

In their arguments that the RSC is not lawful, the Joint Movants ignore the Court's two holdings that the RSC was lawful. The Commission should thus reject their arguments.

2. DP&L still provides POLR service

The Joint Movants argue (pp. 9-11) that DP&L is no longer subject to a provider of last resort ("POLR") risk, and that the RSC thus should not have been approved. The Commission should reject that argument not only because R.C. 4928.143(C)(2)(b) requires ("shall") the RSC to be reinstated, but also because DP&L remains subject to a POLR risk.

The Joint Movants argue that DP&L no longer has a POLR risk, since 100% of DP&L's SSO load is currently provided by suppliers that were the winning bidders at auctions to serve that load. However, when DP&L previously withdrew its ESP II application under R.C. 4928.143(C)(2)(a), the Commission rejected that exact argument because DP&L was still subject to POLR risk:

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

> Commission has already determined the RSC is a provision, term, or condition of ESP I; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

Aug. 26, 2016 Finding and Order, ¶ 23 (Case No. 08-1094-EL-SSO).

DP&L is still subject to POLR risk for the following reasons.

First, the auctions are conducted periodically, and there is no guaranty that they will continue or that any suppliers will bid. DP&L thus bears a POLR risk that it will have to provide generation service to some or all of its customers if there are not enough bidders at auction.

Second, there is also a risk that winning bidders will default on their obligation to provide generation service to SSO customers. SSO service is provided to customers at a fixed price, and there is a risk that winning bidders will default when demand and market prices spike. DP&L would then be required by R.C. 4928.141(A) to supply generation to those customers, which imposes a POLR risk on DP&L. (The collateral posted by winning bidders may be inadequate because it is only for 30 days, and because the winning bidders could default when market prices are at an extreme peak.)

Third, for customers that have switched -- i.e., do not take SSO service -- they have the right to return to SSO service. R.C. 4928.141(A). They are likely to exercise that right if market prices are high and they are unable to sign a favorable contract with a competitive supplier; in that instance, it may be cheaper for them to return to the fixed-price SSO. Those customers should then be served by the winning bidders at auction, but as demonstrated in the prior two paragraphs, there are risks that (a) there will be no such winning bidders; or (b) the winning bidders will not be able to supply generation to returning customers, or will default on their obligations. In those instances, DP&L would be obligated to procure generation to serve those customers, which imposes POLR risks upon DP&L. (Again, the collateral may be inadequate for the reasons discussed above.)

The Court has acknowledged that POLR obligations impose risks on a utility. Constellation NewEnergy, Inc., 2004-Ohio-6767, ¶ 39, n. 5 ("POLR costs are those costs incurred by [the utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [the utility] for generation service") (emphasis added); In re Application of Columbus S. Power Co., 2011-Ohio-1788, ¶ 23. ("Under Ohio law, customers may purchase generation service from a competitive supplier. If such a supplier fails to provide service, 'the supplier's customers * * * default[] to the utility's standard service offer * * * until the customer chooses an alternative supplier.' R.C. 4928.14. This obligation to stand ready to accept returning customers make the utility the 'provider of last resort,' or 'POLR.'").

The Court should thus reject the argument by the Joint Movants that DP&L no longer has a POLR risk.

3. The RSC is not an unlawful transition charge

The Joint Movants argue (pp. 5-6) that the RSC is an unlawful transition charge under In Re the Application of Columbus S. Power Co., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734. The Commission should reject that argument for the following separate and independent reasons.

First, the Court has held that a change in law does not bar the application of res judicata. Nat'l Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 558 N.E.2d 1178, syllabus: ("Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of res judicata. Since the doctrine of res judicata serves important public and private interests, exceptions to the doctrine's application should be narrowly construed."). Accord: Doe v. Trumbull Cty. Children Services Bd., 28 Ohio St.3d 128, 131, 502 N.E. 2d 605 (1986) (change in controlling decisional law does not support Civ. R. 60(B) motion for relief from judgment; "To hold otherwise would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.'") (citation omitted). As demonstrated above, the arguments by the Joint Movants are barred by the doctrine of res judicata.

Second, R.C. 4928.38 bars a utility from recovering "transition revenue or any equivalent revenues." The Supreme Court has described transition costs as follows:

> "Transition costs (also referred to as stranded costs) are costs incurred by the utility before retail competition began that will not be recoverable through market-based rates. . . . In general, these are generation costs that the utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have switched to another generation provider."

In re Application of Columbus S. Power Co., 2016-Ohio-1608 at ¶ 15 (citation omitted).

POLR risk did not exist before deregulation, and thus is not a cost "incurred by the utility before retail competition began." Id. The RSC cannot be a transition charge.

Nor is the RSC "equivalent" to a transition charge under R.C. 4928.38. The Court has stated that "S.B. 3 allowed electric utilities to receive transition revenues to aid them in making the transition to a fully competitive generation market." Id. ¶ 22 (emphasis added). This Court held that a charge was equivalent to a transition charge when the charge was "a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market" by protecting the utility from expected increases in customer shopping. Id. ¶ 23 (emphasis added).

A charge is thus "equivalent" to a transition charge if it compensates a utility for costs the utility would experience in transitioning to "a fully competitive generation market" -- i.e., declining plant value, customer switching, lower prices. In a fully-competitive market, a supplier does not have a statutory obligation to provide service to customers of another supplier if that other supplier defaults. In contrast, DP&L has a statutory obligation to provide generation to all customers, including customers of competitive suppliers. R.C. 4928.141(A). The RSC compensates DP&L for risks associated with that POLR obligation.

In other words, transition costs are costs like declining plant value or switching customers that a utility experiences in a fully competitive market. There is a key distinction between Ohio's generation market and a "fully competitive market" because DP&L has an obligation to serve customers of competitive suppliers if those suppliers default. R.C. 4928.141(A). The RSC compensates DP&L for those risks, and thus is not a transition charge.

Third, in holding that an ESP charge that constitutes a transition charge was unlawful, the Supreme Court refused to consider whether the "notwithstanding" clause in R.C.

4928.143(B) barred the transition charge argument, because no party raised that argument. In re Application of Columbus S. Power Co., 2016-Ohio-1608, ¶¶ 38-40, ¶ 38, n.3.

The Court later held that the "notwithstanding" clause in R.C. 4928.143(B) barred parties from arguing that otherwise lawful ESP charges were transition charges. In re Application Seeking Approval of Ohio Power Company's Proposal to Enter Into an Affiliate Power Purchase Agreement, 155 Ohio St.3d 326, 2018-Ohio-4698, 121 N.E.3d 320, ¶ 19. In re Ohio Power thus establishes that the RSC is lawful "notwithstanding" the arguments of the Joint Movants that it is a transition charge.

4. The RSC is not unlawful under the Commission's Supplemental Opinion & Order

The Joint Movants (p. 7) tell the Commission that DP&L has described the RSC as a "financial integrity" charge, and argue that the RSC is thus barred by the Commission's recent Supplemental Opinion & Order. The Commission should reject that argument for the following reasons.

First, as demonstrated above, the RSC is a lawful POLR charge, as the Court has twice held. Constellation NewEnergy, 2004-Ohio-6767, ¶¶ 39-40; Ohio Consumers' Counsel, 2007-Ohio-4276, ¶¶ 17-26. The Supreme Court's decisions are binding authority on this Commission.

Second, the Joint Movants cite misleading authority in arguing that DP&L has called the RSC a "financial integrity" charge. They rely on a Commission decision in DP&L's ESP II case in which the Commission describes DP&L's prior SSR as a financial integrity charge. See Joint Movants' Motion, p. 7, n.25, which cites to n.18. That is not a claim by DP&L

that the RSC is a financial integrity charge. Indeed, providing compensation to the utility standing as the POLR is a completely different legal concept than a financial integrity charge such as the SSR and DMR.

Third, the fact that a charge is needed to maintain a utility's financial integrity does not mean that the charge necessarily falls within the scope of the Commission's Supplemental Opinion & Order. For example, DP&L's financial integrity would be in jeopardy if it could not charge its distribution rates. However, that does not mean that DP&L's distribution rates are unlawful under the Commission's Supplemental Opinion & Order.

5. DP&L has submitted evidence supporting the RSC

The Joint Movants claim (p.11) that "[a]t no stage during any of the prior proceedings" has DP&L introduced evidence justifying the RSC as a POLR charge. It bears repeating that R.C. 49298.143(C)(2)(b) does not demand a new factual justification to revert back to the provisions, terms, and conditions of the utility's most recent standard service offer. Moreover, Joint Movants' statement is just false. DP&L submitted evidence supporting the amount of the RSC charge in its 2005 rate plan proceeding. Nov. 4, 2005 Testimony of K. Strunk (Case No. 05-276-EL-AIR). The Court found that evidence to be sufficient to support the RSC. Ohio Consumers' Counsel, 2007-Ohio-4276, ¶ 17-18, 26.

III. THE COMMISSION SHOULD APPROVE DP&L'S OTHER PROPOSED RIDERS

The Joint Movants (p. 15) argue that the Commission should reject DP&L's proposed tariffs for the Storm Rider, Uncollectible Rider, Regulatory Compliance Rider, Decoupling Rider and Distribution Investment Rider. The Commission should reject those arguments for the reasons set forth below:

Storm Rider: The Stipulation and Recommendation in ESP I specifically authorized a Storm Rider. Feb. 24, 2009 Stipulation and Recommendation, ¶ 18.b. R.C. 4928.143(C)(2)(b) provides that the provisions and terms of DP&L's prior SSO "shall" be implemented, so a Storm Rider is permitted. Indeed, when DP&L reverted from ESP II to ESP I, the Commission held that DP&L could implement a Storm Rider. Aug. 26, 2016 Finding & Order, ¶ 26 (Case No. 08-1094-EL-SSO) ("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 cost of storm damage.").

Uncollectible Rider: The Uncollectible Rider was approved in both DP&L's distribution rate case (Case No. 15-1830-EL-AIR) and in the ESP III case (Case No. 16-395-EL-SSO). The distribution rate case remains as a separate and independent basis for the Uncollectible Rider. Specifically, in the distribution rate case, DP&L sought approval of the Uncollectible Rider in its Application. Application, p. 3; Teuscher Test, pp. 3-6.

The Stipulation in that case states that "Except as modified by this Stipulation or the Staff Report, DP&L's Application in this proceeding is approved." Stipulation, p. 15. Neither the Stipulation nor the Staff Report modified DP&L's request for the Uncollectible Rider. See Staff Report, p 15. The Stipulation in DP&L's distribution rate case thus serves as an independent legal basis for the Uncollectible Rider.

No party filed an application for rehearing arguing that the Commission's approval of the Uncollectible Rider in the distribution rate case was unlawful. R.C. 4903.10. The Uncollectible Rider was thus lawfully approved in DP&L's

distribution rate case, and remains lawful after the termination of DP&L's ESP III. (DP&L subsequently filed an application to update its Uncollectible Rider (19-0777-EL-UEX) and the Staff issued its Review and Recommendation supporting the recovery of its uncollectible costs.)

Regulatory Compliance Rider: Similar to the Storm Rider, the ESP I Stipulation authorizes DP&L to recover "[t]he cost of complying with changes in tax or regulatory laws and regulations effective after the date of this Stipulation." Feb. 24, 2009 Stipulation and Recommendation, ¶ 18.a (Case No. 08-1094-EL-SSO). That provision thus authorizes DP&L to implement the Regulatory Compliance Rider to recover compliance costs.

Decoupling Rider: Like the Storm and Regulatory Compliance Riders, the ESP I Stipulation authorizes DP&L to recover "lost revenue." Feb. 24, 2009 Stipulation and Recommendation, ¶ 5 (Case No. 08-1094-EL-SSO). Decoupling revenues are a form of lost revenue.

Distribution Investment Rider: Like the Uncollectible Rider, the Distribution Investment Rider ("DIR") was approved in both DP&L's distribution rate case (Case No. 15-1830-EL-AIR) and in the ESP III case (Case No. 16-395-EL-SSO). The distribution rate case is a separate and independent basis for the DIR.

Specifically, in DP&L's distribution rate case, the Staff Report recommended that DP&L be entitled to recover the DIR. Staff Report, pp. 8-10. Once the Staff recommended that the DIR be included in DP&L's distribution rate case, that recommendation became subject to the requirements applicable to distribution rate cases. In particular, parties were required to file objections to recommendations in the Staff Report, and if they failed to do so, then those objections are waived. R.C. 4909.19(C); Ohio Adm.Code 4901-1-28(C). Further, pursuant to

Ohio Adm.Code 4901-1-28(D), "[i]n a rate case proceeding, an objection to a staff report will be deemed withdrawn if a party fails to address the objection in its initial brief."

The only parties to object to the inclusion of DP&L's DIR in the Staff Report were the Joint Movants -- OMA, OCC and Kroger. However, those parties later signed a Stipulation authorizing the recovery of the DIR. Jun. 18, 2018 Stipulation and Recommendation, pp. 17-18 (Case No. 15-1830-EL-AIR). None of those three parties challenged the DIR in their initial briefs, and none sought rehearing on that issue following the Commission's Opinion & Order approving the Stipulation in that case; thus, they waived any challenge to the DIR. R.C. 4903.10; Ohio Adm. Code 4901-1-28.

Additionally, DP&L's distribution rate case Stipulation adopts the Staff Report (except as otherwise modified in the Stipulation), which recommended the DIR. The Stipulation did not modify Staff's recommended adoption of the DIR. The Commission approved that Stipulation without modification.

Thus, by operation of the laws regarding distribution rate cases, the DIR was lawfully approved in the distribution rate case and that case serves as an independent basis for the DIR.

Respectfully submitted,

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I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Motion to Reject DP&L's Tariffs has been served via electronic mail upon the following counsel of record, this 10th day of December, 2019:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to Motion to Reject DP&L's Tariffs electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company