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**

SECOND FINDING AND ORDER

Entered in the Journal on December 18, 2019

I. SUMMARY

{¶ 1} In this Second Finding and Order, the Commission approves Dayton Power & Light Company's proposed revised tariffs, subject to the modifications directed 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 (MRO)

in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a 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.

{¶ 5} By Opinion and Order issued in the above-captioned cases on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (Stipulation) to establish DP&L's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission continued ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved DP&L's application for a second ESP (ESP II). *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.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II pursuant to the Court's remand and then granted DP&L's application to withdraw ESP II, thereby terminating it. *ESP II Case,* Finding and Order (Aug. 26, 2016). The Supreme Court of Ohio dismissed as moot the subsequent appeals of the August 26, 2016 Finding and Order. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied,* 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 545.

{¶ 7} In light of DP&L's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted DP&L's application in these cases to implement the provisions,

terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2019), Third Entry on Rehearing (Dec. 14, 2016). The Supreme Court dismissed as moot the ensuing appeal. *In re Dayton Power & Light Co.*, 154 Ohio St.3d 1434, 2018-Ohio-4732, 112 N.E.3d 920. The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing DP&L's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.,* Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131.

{¶ 8} Subsequently, Interstate Gas Supply (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case,* Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case,* eliminating DP&L's distribution modernization rider (DMR), in light of the Supreme Court of Ohio's decision in *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 454 (Table), and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458 (Table). *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶¶ 1, 102-110, 134.

{¶ 9} R.C. 4928.143(C)(2)(a) states that if the Commission modifies and approves an application for an ESP, the EDU may withdraw the application, thereby terminating it. On November 26, 2019, DP&L filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to this statute. The Commission accepted that withdrawal in the *ESP III Case* contemporaneously with this Second Finding and Order.

{¶ 10} On November 26, 2019, DP&L also filed proposed tariffs in these proceedings to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP

III. On November 27, 2019, the attorney examiner directed interested parties to file comments or otherwise respond to the proposed tariffs by December 4, 2019.

{¶ 11} On December 4, 2019, comments were filed by Ohio Energy Group (OEG), Ohio Hospital Association (OHA), Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy Supply Association (RESA). Joint comments were filed on December 4, 2019 by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers' Counsel, Ohio Manufacturers' Association (OMA)[1] and Kroger (Consumer Groups) filed a motion on December 4, 2019, seeking rejection of DP&L's proposed tariff filing. DP&L filed a memorandum contra the Consumer Groups' motion on December 10, 2019. Consumer Groups filed a reply on December 17, 2019.

III. DISCUSSION

{¶ 12} The Commission notes that many parties simultaneously filed their comments or responses in both these proceedings and the *ESP III Case*. All comments related to DP&L's notice of withdrawal will be addressed in the *ESP III Case*. We will address in this Second Finding and Order only the comments related to the proposed tariff filed on November 26, 2019.

{¶ 13} IEU-Ohio and Dayton/Honda contend that the economic development provisions in ESP III must be continued if the RSC is approved. IEU-Ohio contends that DP&L's proposed tariffs are deficient because the proposed tariffs do not continue the economic development provisions contained in the amended stipulation filed in the *ESP III Case*. IEU-Ohio and Dayton/Honda contend that the amended stipulation provided that the economic development provisions would continue as long as the DMR or a successor financial integrity charge exists. IEU-Ohio and Dayton/Honda note that the economic development provisions were tied to the duration of the DMR, an extended DMR, or when an equivalent economic stability charge intended to provide financial stability to DP&L or

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[1] On December 12, 2019, Consumer Groups filed a corrected motion replacing the Ohio Manufacturers' Association Energy Group with the Ohio Manufacturers' Association as a party to the pleading.

DPL Inc., whether proposed in the *ESP III Case* or another proceeding, expires. *ESP III Case*, Opinion and Order at ¶ 14. IEU-Ohio asserts that, as a provider of last resort (POLR) charge, the RSC is such a successor charge. Moreover, IEU-Ohio argues that, when DP&L withdrew ESP II and reinstated the provisions of ESP I, the Commission continued two provisions from the withdrawn ESP during the period of the successor SSO under R.C. 4928.143(C)(2)(b), specifically, the procurement of SSO generation through a competitive bid process and the continuation of a nonbypassable transmission charge. IEU-Ohio argues that continuing a financial integrity charge without the economic development provisions would yield an unjust, unreasonable and unlawful result. Thus, IEU-Ohio argues that, if the Commission declines to continue the economic development provisions of the amended stipulation in the *ESP III Case*, the Commission should terminate the RSC, set the RSC to zero, or make the RSC bypassable.

{¶ 14} Similarly, OHA notes that it supported the Stipulation which created the RSC in exchange for provisions equipping hospitals to better manage their energy demand and that OHA took a similar approach when it supported the amended stipulation which established the DMR. OHA expresses its concern that the RSC will replace the DMR without the tools to support hospitals in managing their energy demand and costs.

{¶ 15} OHA further comments that restoring the RSC raises significant outstanding legal issues that warrant further consideration from the Commission, including whether the RSC expired on December 31, 2012, pursuant to the terms of the Stipulation in these cases, whether it was appropriate for the Commission to restore the RSC upon the termination of ESP II, and whether the RSC is an unlawful transition charge. Likewise, Consumer Groups allege that the RSC is an unlawful transition charge, citing to the Supreme Court of Ohio's decisions in *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, and *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179.

{¶ 16} Dayton/Honda comments that Ohio law balances DP&L's right to withdraw with tests under R.C. 4928.143(E) to ensure the ESP is more favorable in the aggregate than an MRO (ESP v. MRO Test) and under R.C. 4905.22 to ensure that rates are just and reasonable. Dayton/Honda argue that the Commission is required to conduct a four-year review of ESP I, including both an ESP v. MRO Test and a significantly excessive earnings test, because the provisions of ESP I have been in effect for a cumulative total of more than five years.

{¶ 17} Dayton/Honda also claim that the Commission should approve only those provisions, terms, and conditions that are lawful for inclusion in an ESP, citing the requirement of R.C. 4905.22 that all rates must be just and reasonable. Dayton/Honda and Consumer Groups note that DP&L no longer owns generation and thus may not credibly claim that the RSC compensates DP&L for POLR risk. Dayton/Honda, joined by Consumer Groups, further claim that the legal landscape now precludes approval of a either a stability charge or a financial integrity charge, citing the Commission's decision to terminate the DMR. *ESP III Case*, Supplemental Opinion and Order at ¶¶ 103, 108. Consumer Groups contend that, because DP&L is not providing POLR service, it is unreasonable for it to charge customers for the service and that there is no evidentiary support for allowing DP&L to charge customers for POLR. Dayton/Honda also ask the Commission to take into account the Supreme Court's decision to dismiss as moot the appeals of the Commission's decision to implement the provisions, terms and conditions of ESP I when DP&L withdrew from ESP II.

{¶ 18} Dayton/Honda, Consumer Groups, and RESA claim that DP&L's proposed tariffs do not simply revert to ESP I but that DP&L has selectively picked riders from ESP III to remain in effect. Dayton/Honda note that the distribution investment rider (DIR), the storm cost recovery rider, and the regulatory compliance rider (RCR) were created or materially modified by ESP III and, as such should be removed unless DP&L elects to remain in ESP III.

{¶ 19} RESA notes that DP&L's tariff filings left in place certain riders established in ESP III, such as the DIR. Thus, RESA argues that DP&L should continue its commitments under the amended stipulation in the *ESP III Case* which are not linked to the DMR or the term of ESP III. RESA avers that these commitments include competitive retail market enhancements agreed to in the amended stipulation in the *ESP III Case*, including provisions for non-commodity billing and a pilot two-year supplier consolidated billing program., as well as various tariff changes which DP&L has already implemented and does not now seek to undo. RESA contends that these commitments are not linked to the DMR or ESP III's term and that these commitments advance state policies under R.C. 4928.02. Finally, RESA requests that the Commission ensure certainty and avoid any interruptions in the competitive retail marketplace.

{¶ 20} Finally, Dayton/Honda allege that DP&L has failed to establish any harm to customers if Rider RSC is not approved. Dayton/Honda aver that DP&L has not established that borrowing costs would increase in any meaningful way if the RSC is not reinstated. Dayton/Honda further claim that DP&L has not established that, even if DPL, Inc., sought bankruptcy protection, it would have any impact on customers. Thus, in the absence of any negative outcome for customers, Dayton/Honda oppose reinstatement of the RSC.

{¶ 21} In its memorandum contra the motion filed by the Consumer Groups, DP&L responds that the Consumer Groups ignore R.C. 4928.143(C)(2)(b). DP&L contends that, in the event a utility exercises its right to withdraw and terminate an ESP 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. DP&L contends that "shall" is mandatory. *E.G. Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834 (1971).

{¶ 22} DP&L also contends that the Consumer Groups are barred from challenging the RSC. DP&L notes that R.C. 4928.143(C)(2)(b) was in place in 2009 when OCC, OMA and Kroger signed the Stipulation in this case; thus DP&L claims that the Consumer Groups

were on notice that DP&L had the right to reinstate ESP I if the Commission were to modify and approve subsequent ESPs. DP&L further notes that no party to this case sought rehearing of the Commission's decision to approve the 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). DP&L further claims that Consumer Groups are also barred from challenging the lawfulness of the RSC by the doctrines of res judicata and collateral estoppel. *O'Nesti v. DeBartolo Realty Corp.,* 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6, 7.

{¶ 23} In addition, DP&L argues that, even if R.C. 4928.143(C)(2)(b) did not require that the RSC be implemented, the RSC would still be lawful. DP&L alleges that the Consumer Groups ignore two rulings by the Supreme Court of Ohio that the RSC is lawful. DP&L first notes that a Rate Stabilization Surcharge (RSS) was established six years before this proceeding began, and that the Supreme Court rejected a claim that it was unlawful. *Constellation NewEnergy v. Pub. Util. Comm. of Ohio*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶¶ 39-40. Second, the RSC was approved by the Commission in 2005, as part of DP&L's rate plan preceding ESP I, and the Court again held that the RSC was lawful. *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio,* 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶¶ 17-26. DP&L further contends that it still provides POLR service and that it remains subject to POLR risk. Finding and Order at ¶ 23. DP&L disputes Consumer Groups claim that the RSC is an unlawful transition charge and that the RSC is a financial integrity charge. DP&L claims that, as a POLR charge, the RSC cannot be a transition charge and is not barred by the Commission's decision in the *ESP III Case. ESP III Case,* Supplemental Opinion and Order at ¶¶ 102-110. Finally, DP&L claims that it has submitted evidence supporting the RSC. *In re Dayton Power and Light Co.,* Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005) at 8, 11, 15; *Ohio Consumers' Counsel,* 2007-Ohio 4276 at ¶¶ 17-18, 26.

{¶ 24} In addition, DP&L argues that the Commission should approve its other proposed riders. DP&L notes that the Stipulation in this proceeding specifically authorizes a storm damage recovery rider. DP&L claims that the uncollectible rider and the DIR were approved in both the *ESP III Case* and its most recent distribution rate case. *In re Dayton*

Power and Light Co., Case No. 15-1830-EL-AIR. DP&L contends that the distribution rate case provides a separate and independent basis for both the uncollectible rider and the DIR. With respect to the RCR, DP&L claims that, like the storm rider, the Stipulation in this case authorizes DP&L to recover regulatory compliance costs. Further, DP&L claims that the Stipulation is this case authorized DP&L to collect "lost revenue" and that the decoupling revenues collected by the decoupling rider are a form of "lost revenue."

{¶ 25} In their reply filed on December 17, 2019, Consumer Groups reiterate the arguments made in support of the motion filed on December 4, 2019. Consumer Groups contend that DP&L cannot include provisions from ESP III among the provisions, terms, and conditions of ESP I. Consumer Groups deny that they are barred from challenging the RSC at this time. Specifically, Consumer Groups claim that, because the stipulating parties chose to settle the matter in lieu of litigation, the lawfulness of the RSC was not necessarily and actually determined when the Commission approved the Stipulation establishing ESP I. Further, Consumer Groups repeat their objections to reinstating the RSC as a POLR charge.

IV. CONCLUSION

{¶ 26} In these proceedings, the Commission is bound by the plain language of R.C. 4928.143(C)(2)(b), which states:

> 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.

{¶ 27} DP&L has exercised its statutory right to withdraw ESP III. DP&L's most recent SSO would be ESP I, which was reinstated by the Commission in the Finding and Order issued on August 26, 2016 in these proceedings. ESP I remained in effect until the effective date of ESP III, on November 1, 2017. According to the plain language of the statute, the Commission must restore the provisions, terms and conditions of ESP I which were in effect prior to the effective date of ESP III.

{¶ 28} We note that, in the Finding and Order issued on August 26, 2016, the Commission modified two provisions of ESP I, in order to maintain the integrity of competitive wholesale and retail markets in this state. First, the Commission approved DP&L's proposal to continue to recover these costs of energy and capacity to serve SSO customers through a competitive bidding process (CBP) in order to honor existing contracts with CBP suppliers and maintain current PJM obligations for all suppliers. In the Finding and Order, the Commission noted that 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; thus the Commission determined that R.C. 4928.143(C)(2)(b) allows adjustment for purchased power as well as fuel, as it is longstanding regulatory practice for "fuel" and "purchased power" to be used interchangeably. *ESP I Case*, Finding and Order (Aug. 26, 2016) at ¶ 21; Third Entry on Rehearing (Dec. 14, 2016) at ¶ 17. We expect DP&L to continue to request appropriate CBP auction schedules as necessary to continue to serve SSO customers until DP&L's next SSO is approved. Second, the Commission continued DP&L's transmission cost recovery riders, TCRR-B (bypassable) and TCRR-N (non-bypassable), approved by ESP III, in order to avoid unduly disrupting both the CBP supplying the SSO and individual customer contracts with competitive retail electric service suppliers. *ESP I Case*, Finding and Order at ¶ 24; Third Entry on Rehearing at ¶ 22-23. Moreover, we affirm our previous conclusion that R.C. 4928.02(G) provides that it is the policy of this state to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment and that such flexible regulatory treatment is necessary in these cases to protect the public interest,

maintain reasonable rates, ensure the integrity of existing contracts and protect the CBP process for procuring SSO generation. Third Entry on Rehearing at ¶¶ 18, 23. Accordingly, these two modifications, which were necessary to protect competitive markets in this state, should continue as provisions, terms and conditions of ESP I, as it was in effect prior to the adoption of ESP III.

{¶ 29} Several parties raise various objections regarding the implementation of the RSC as a provision, term, or condition of ESP I. Many of these objections are similar to objections which were addressed by the Commission in these proceedings in the Finding and Order issued on August 26, 2016 when DP&L withdrew from ESP II or in the Third Entry on Rehearing issued on December 14, 2016. Finding and Order at ¶ 14, 19, 23; Third Entry on Rehearing at ¶ 25-34. Although parties request that the Commission revisit these decisions, we will respect our precedents in order to assure the predictability which is essential in administrative law. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 at ¶ 16 (*quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)).

{¶ 30} Dayton/Honda argue that "the Commission should take the Supreme Court's mootness decision into account" when deciding whether to allow the RSC to be put back into place. The Commission finds that this argument is misguided. We will not infer anything from the Supreme Court's decision to dismiss the appeal as moot, other than that the Court determined that the appeal was moot. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 1434, 2018-Ohio-4732, 112 N.E.3d 920 (Table).

{¶ 31} OHA questions whether the RSC was properly extended by the Commission on December 19, 2012, when ESP I's term expired while the *ESP II Case* was pending before the Commission. However, as we noted in the Finding and Order issued on August 26, 2016, the Commission's decision to extend the RSC, by Entry issued on December 19, 2012, cannot be challenged now. Finding and Order at ¶ 23. When the Commission extended

ESP I, the Commission determined that the RSC was one of the provisions, terms and conditions of ESP I, and, as such, the RSC should continue with ESP I until a subsequent SSO is authorized. Entry (Dec. 19, 2012) at 3-4. On February 19, 2012, the Commission issued the first Entry on Rehearing in these proceedings, affirming our determination that the RSC is a provision, term, or condition of ESP I. Entry on Rehearing (Feb. 19, 2013) at 4-6. No party, including OHA, appealed this ruling by the Commission. Thus, the Entry issued on December 19, 2012 is a final, non-appealable order of the Commission and any challenge to that Entry is untimely and barred by R.C. 4903.10.

{¶ 32} Further, we agree with DP&L that OHA's claim is barred by res judicata and collateral estoppel. Res judicata and collateral estoppel "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Ohio Power Co.,* 2015-Ohio-2056 at ¶ 20 (*quoting Consumers' Counsel v. Pub. Util. Comm.,* 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)). "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." Third Entry on Rehearing at ¶ 33 (*quoting Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908). "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). *See also, O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803. Therefore, the Commission affirms our previous determination that OHA's argument is untimely and barred by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). Finding and Order (Aug. 26, 2016) at ¶ 23.

{¶ 33} With respect to the argument by OHA and Consumer Groups that the RSC is an unlawful transition charge, the Commission finds that these arguments are, at the very least, erroneous. The Consumer Groups cite to the Supreme Court of Ohio's decisions in *In*

re Application of Columbus S. Power Co., 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 and *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. In *Columbus S. Power Co.*, the Supreme Court held that AEP Ohio's retail stability rider unlawfully allowed AEP Ohio to collect the equivalent of transition revenues in AEP Ohio's second ESP. *Columbus S. Power Co.* at ¶ 21-25, 38. However, Consumer Groups fail to distinguish, or even acknowledge, the later Supreme Court decision in which the Court held that the "notwithstanding" clause of R.C. 4928.143(B) allows an ESP to include items that R.C. Title 49 would otherwise prohibit, including the prohibition against the collection of transition revenues or any equivalent revenues contained in R.C. 4928.38. *In re Application of Ohio Power Co.*, 155 Ohio St.3d 326, 2018-Ohio-4698 at ¶¶ 17-19. Based upon this most recent Supreme Court of Ohio decision, we find that, because the RSC is a provision of ESP I, R.C. 4928.143(B) exempts the RSC from the prohibition against the collection of transition revenues or any equivalent revenues contained in R.C. 4928.38.

{¶ 34} In addition, consistent with our decision in the Third Entry on Rehearing, the Commission finds that claims that RSC is an unlawful transition charge are untimely and are barred by res judicata and collateral estoppel. *See* Third Entry on Rehearing at ¶¶ 32-33. After an evidentiary hearing, the Commission adopted the Stipulation filed in these cases by Opinion and Order issued on January 24, 2009. Opinion and Order (Jan. 24, 2009) at 4, 11, 12-13. The Stipulation adopted by the Commission provided for the extension of the RSC for the duration of ESP I. Opinion and Order at 5. However, no applications for rehearing were filed with respect to the Opinion and Order. Thus, any claim that the RSC is an unlawful transition charge is untimely and barred by R.C. 4903.10. Moreover, OHA, OMA, OCC and Kroger (as well as IEU-Ohio, Honda and Dayton) were signatory parties to the Stipulation approved by the Commission in these cases. Opinion and Order at 4. OHA and Consumer Groups had ample opportunity to oppose the RSC and to claim that the RSC was an unlawful transition charge but failed to raise this claim at that time. As previously noted by the Commission, "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). Therefore, collateral estoppel and res judicata bar OHA and Consumer Groups from raising this claim now.

{¶ 35} We are not persuaded by Dayton/Honda's reliance on R.C. 4905.22 in support of their argument that the Commission should approve only those provisions, terms, and conditions that are lawful for inclusion in an ESP. As noted above, the "notwithstanding" clause in R.C. 4928.143(B) exempts provisions in an ESP from "any other provision of Title XLIX of the Revised Code to the contrary" (with certain limited exceptions which are not relevant here). R.C. 4928.143(B). Similarly, we find that signatory parties to the Stipulation in these cases cannot raise new facts or other issues to challenge the lawfulness of the provisions, terms, and conditions of ESP I. The Stipulation adopted by the Commission in these proceedings 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." Third Entry on Rehearing at ¶ 31 (quoting Stipulation (Feb. 24, 2009) at 17-18). The lawfulness of the provisions, terms, and conditions of ESP I was determined by the Commission in the Opinion and Order, which adopted the Stipulation among the parties in this case. This determination necessarily included a determination that the RSC was a reasonable charge. Opinion and Order at 5, 7-10. No party filed an application for rehearing with respect to the Opinion and Order; thus, the Opinion and Order is a final, non-appealable order of the Commission, and any new challenge to the Opinion and Order is barred by both the express language of the Stipulation and by R.C. 4903.10.

{¶ 36} However, we agree with parties who argued that ESP I did not include riders such as the DIR, the reconciliation rider, the decoupling rider, the RCR, and the uncollectible rider, and that these riders should not be continued with the withdrawal of ESP III. Each of these riders was created in the *ESP III Case.* DP&L has proposed the elimination of the reconciliation rider, and we agree, as the reconciliation rider was created in ESP III. Likewise, although DP&L has proposed to continue the decoupling rider and the RCR, these two riders were created in ESP III and should be eliminated.

{¶ 37} Further, DP&L has proposed to continue the DIR and uncollectible rider. We disagree. The DIR and the uncollectible rider were created in ESP III and should be eliminated. We acknowledge that the levels of the DIR and uncollectible rider were established in DP&L's most recent distribution rate case. *In re Dayton Power and Light Co.*, 15-1830-EL-AIR et al., Opinion and Order (Sep. 26, 2016) at ¶ 54. However, both the DIR and the uncollectible rider were created in ESP III and set to zero. Therefore, these two riders should be eliminated with the withdrawal of ESP III. Moreover, neither the DIR nor the uncollectible rider could be created in the distribution rate case. The DIR and uncollectible riders are rate adjustment clauses; and R.C. 4909.18 does not authorize the creation of rate adjustment clauses. Unless authorized by statute, rate adjustment clauses cannot be created in a distribution rate case. *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 183, 429 N.E.2d 444 (1981).

{¶ 38} Therefore, DP&L is directed to file new revised final tariffs, which remove the provisions for the decoupling rider, the RCR, the DIR, and the uncollectible rider.

{¶ 39} Nonetheless, the Commission notes that the Stipulation adopted in these cases contained placeholders permitting DP&L to seek approval of a storm cost recovery rider, as well as a transmission cost recovery rider, and a rider to recover regional transmission organization costs not recovered in the TCRR. Opinion and Order at 5-6. Therefore, the Commission finds that the storm cost recovery rider and the TCCR-N are authorized by ESP I, independent of ESP III, and should be continued. *See also,* Third Entry on Rehearing at ¶¶ 24, 26.

{¶ 40} We cannot accept RESA's recommendation to continue the competitive market enhancements contained in the amended stipulation filed in the *ESP III Case*. *ESP III Case*, Opinion and Order at ¶14. These competitive market enhancement are not independent of ESP III, and any obligation of DP&L, or any other party, to implement the competitive market enhancements is terminated with the withdrawal of ESP III. Likewise, we disagree with IEU-Ohio and Dayton/Honda that the economic development provisions

of the amended stipulation filed in the *ESP III Case* should be continued. We are not persuaded that the RSC, as a POLR charge, is "an equivalent economic stability charge" pursuant to the amended stipulation. Opinion and Order at ¶ 14. Instead, the Commission finds that the economic development provisions contained in the amended stipulation are provisions of ESP III and should be terminated with the withdrawal of ESP III.

{¶ 41} We agree with the issue raised by Dayton/Honda that R.C. 4928.143(E) requires the Commission to periodically test an ESP if the term exceeds three years and that the term of ESP I has cumulatively exceeded the three years specified in the statute. Accordingly, we direct DP&L to open a docket, no later than April 1, 2020, in which the Commission will conduct both the ESP v. MRO Test and the prospective significantly excessive earnings test specified in R.C. 4928.143(E).

{¶ 42} For the foregoing reasons, the Commission finds that DP&L's proposed revised tariffs, subject to the modifications described above, do not appear to be unjust or unreasonable, are consistent with R.C. 4928.143(C)(2), and should be approved. Further, the Commission finds that no hearing is necessary at this time.

V. ORDER

{¶ 43} It is, therefore,

{¶ 44} ORDERED, That DP&L's revised tariffs be approved, subject to the modifications directed by this Second Finding and Order. It is, further,

{¶ 45} ORDERED, That DP&L file, in final form, two complete copies of revised final tariffs, consistent with this Second Finding and Order. DP&L shall file one copy in its TRF docket and one copy in each of the above-captioned case dockets. It is, further,

{¶ 46} ORDERED, That the revised final tariffs shall be effective upon filing, subject to final review by the Commission. It is, further,

{¶ 47} ORDERED, That DP&L shall notify all affected customers via a bill message or via a bill insert 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,

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

COMMISSIONERS:
Approving:
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Sam Randazzo, Chairman
Lawrence K. Friedeman

GAP/hac

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