

## 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. 16-395-EL-SSO

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

CASE NO. 16-396-EL-ATA

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

CASE NO. 16-397-EL-AAM

### FINDING AND ORDER

Entered in the Journal on December 18, 2019

#### I. SUMMARY

{¶ 1} The Commission finds that the Dayton Power and Light Company has a statutory right to withdraw its application for an electric security plan and, therefore, approves the notice of withdrawal. The Commission further finds that the withdrawal effectively terminates the electric security plan and that this proceeding should be dismissed.

#### II. APPLICABLE LAW

{¶ 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 mandates that an electric distribution utility (EDU) shall provide 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 service, to all consumers within its certified territory. 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} Pursuant to R.C. 4928.143(C)(2)(a), if the Commission and approves an application for an ESP filed under R.C. 4928.143(C)(1), the EDU may withdraw the application, thereby terminating it. Furthermore, pursuant R.C. 4928.143(C)(2)(b), if the utility exercises its statutory right to terminate an application for an ESP under R.C. 4928.143(C)(2)(a), the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO until a subsequent SSO is authorized.

### III. PROCEDURAL HISTORY

#### A. DP&L's Previous ESP Cases: ESP I and ESP II

{¶ 5} By Opinion and Order issued on June 24, 2009, the Commission approved a stipulation and recommendation to establish 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). Among other terms, conditions, and charges, ESP I included a rate stabilization charge (RSC). Subsequently, on December 19, 2012, the Commission continued ESP I, including the RSC, until a subsequent SSO could be authorized. *ESP I Case*, Entry (December 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, 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 a subsequent appeal of the Commission's 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 554.

{¶ 7} In light of DP&L's withdrawal of its application for ESP II, the Commission granted DP&L's application to implement the provisions, terms, and conditions of its most recent SSO—ESP I—until a subsequent SSO could be authorized pursuant to R.C. 4928.143(C)(2)(b). *ESP I Case*, Finding and Order (Aug. 26, 2016), Third Entry on Rehearing (Dec. 14, 2016). The Supreme Court of Ohio 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.

**B. This Proceeding: ESP III**

{¶ 8} Meanwhile, in this proceeding, on February 22, 2016, as amended on October 11, 2016, DP&L filed an application (Application) for a third ESP (ESP III). On October 20, 2017, the Commission issued an Opinion and Order (Opinion and Order) modifying and approving an amended stipulation (Amended Stipulation) executed by most, but not all, of the interested parties. ESP III was thus established, effective November 1, 2017.

{¶ 9} On October 19, 2018, at the conclusion of the rehearing process, Interstate Gas Supply, Inc. withdrew from the Amended Stipulation, necessitating a second evidentiary hearing. *ESP III Case*, Entry (Nov. 15, 2018); Entry (Nov. 20, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order on November 21, 2019 (Supplemental Opinion and Order). Therein, the Commission further modified and approved the Amended Stipulation establishing ESP III, 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 458 (*Ohio Edison*). Supplemental Opinion and Order (Nov. 21, 2019) at ¶1, 102-110, 134.

{¶ 10} On November 26, 2019, DP&L filed a notice of withdrawal (Notice) of its Application for ESP III, stating that it is exercising its statutory right to withdraw its Application under R.C. 4928.143(C)(2)(a). Additionally, citing to R.C. 4928.143(C)(2)(b), DP&L further states that it is exercising its statutory right to implement its most recent SSO, i.e., ESP I. The Notice was filed both in this proceeding and in the *ESP I Case*, in which DP&L also filed a notice of revised tariffs (Proposed Tariffs) asserted to be consistent with the tariffs approved in the *ESP I Case* that were in effect before the Commission's October 20, 2017 Opinion and Order.

{¶ 11} By Entry dated November 27, 2019, the attorney examiner invited any party to this proceeding to respond to the November 26, 2019 Notice on or before December 4, 2019.<sup>1</sup> On that date, Ohio Energy Group (OEG), Industrial Energy Users-Ohio (IEU-Ohio), and the Retail Energy Supply Association (RESA) individually responded the Notice. Additionally, the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), and IGS Energy (IGS) joined the Ohio Consumers' Counsel (OCC) (together, OCC/OMAEG/Kroger/IGS) in filing a memorandum contra the Notice.<sup>2</sup> Also on December 4, 2019, the City of Dayton (Dayton) and Ohio Partners for Affordable Energy (OPAE) filed a joint motion to strike the Notice, to which DP&L filed a memorandum in opposition on December 10, 2019. Dayton and OPAE filed a reply in support of their joint motion to strike on December 16, 2019.<sup>3</sup>

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<sup>1</sup> By a separate November 27, 2019 Entry, issued in the *ESP I Case*, the attorney examiner invited interested parties to file comments or otherwise respond to the Proposed Tariffs on or before December 4, 2019.

<sup>2</sup> On December 5, 2019, OCC, OMAEG, Kroger, and IGS jointly filed a corrected memorandum contra, explaining that the original filing inadvertently omitted a heading within the narrative. The Commission accepts and considers the corrected memorandum herein.

<sup>3</sup> The Commission notes that OEG, IEU-Ohio, RESA, OCC, OMAEG, Kroger, and IGS filed their responses in both this proceeding and the *ESP I Case*. All comments related to the Proposed Tariffs will be addressed in the *ESP I Case*. In this case, we will address only DP&L's withdrawal of its ESP III Application.

#### IV. DISCUSSION

##### A. *Parties' Arguments*

##### 1. The Amended Stipulation's Withdrawal Provision

{¶ 12} All of the responding parties (Responding Parties) argue that DP&L's ability to withdraw its Application for ESP III is subject to paragraph 5 of the Amended Stipulation's "Section XI. Other Provisions," which includes the following language regarding a signatory party's ability to withdraw from the settlement (Withdrawal Provision):

This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification. \* \* \* If the Commission does not adopt the Stipulation without material modification upon rehearing, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, then within thirty (30) days of the Commission's Entry on Rehearing or Order on Remand: (a) any Signatory Party may withdraw from the Stipulation by filing a notice with the Commission ("Notice of Withdrawal"); or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice ("Utility Notice"). Upon the filing of such Utility Notice by DP&L, the Stipulation shall immediately become null and void. No Signatory Party shall file a Notice of Withdrawal or Utility Notice without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation. \* \* \* If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are unsuccessful, and a Signatory Party files a Notice of Withdrawal, then the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based on the record and briefs. \* \* \*

(Footnote omitted.) (Jt. Ex. 1 at 38-39.) Pointing to the Withdrawal Provision, the Responding Parties essentially argue that ESP III is the result of a settlement—the Amended Stipulation—which purposefully binds DP&L to a specific process for withdrawal. IEU-

Ohio, OCC/OMAEG/Kroger/IGS, and Dayton and OPAE explicitly allege that interested stakeholders deliberately intended the Withdrawal Provision to avoid DP&L withdrawing ESP III and that DP&L agreed to limit its right to do so. As such, the Responding Parties allege that DP&L must do at least two things before it can attempt to withdraw from ESP III: (1) apply for rehearing of the Commission Order materially modifying the settlement and (2) negotiate in good faith with the other signatory parties to achieve an outcome that substantially satisfies the intent of the agreement. Because DP&L has done neither, the Objecting Parties assert that the Notice is premature and should have no effect and/or should be stricken.

## **2. Waiver**

{¶ 13} In addition to requesting that the Notice be stricken, Dayton and OPAE offer an alternative argument. Dayton and OPAE urge the Commission to find that, even if DP&L has a statutory right to withdraw its Application, DP&L has waived that right via contract: the Withdrawal Provision of the Amended Stipulation. Dayton and OPAE assert that Ohio law is clear that statutory rights may be waived by an agreement supported by sufficient consideration, provided such waiver is not contrary to public policy. *Sanitary Commercial Servs., Inc. v. Shank*, 57 Ohio St.3d 178, 566 N.E.2d 1215 (1991); *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Wast Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 1996-Ohio-68, 665 N.E.2d 202. Dayton and OPAE submit that DP&L contractually agreed to waive its statutory right under R.C. 4928.143(C)(2)(a) by executing the Amended Stipulation, for which it received ample consideration, and that no public policy prohibits the waiver. In its memorandum in opposition to the joint motion to strike, DP&L denies having waived its statutory right to withdraw its application under R.C. 4928.143(C)(2)(a).

## **3. No Statutory Right to Withdraw**

{¶ 14} Lastly, OCC/OMAEG/Kroger/IGS, and OEG argue that DP&L has no statutory right under R.C. 4928.143(C)(2)(a) to withdraw ESP III under the particular

circumstances of this case. These parties argue that the plain language of the statute permits withdrawal only if the Commission modifies and approves an application, but in this proceeding, the Commission modified and approved a settlement. OCC/OMAEG/Kroger/IGS reason that because the statute is silent as to the utility's right to withdraw when the Commission modifies a settlement, any statutory right to withdraw an application when it is modified by the Commission is not implicated.

{¶ 15} OEG contends that the statutory right to withdraw an application simply does not apply when: (1) the impacted ESP is the product of a final, appealable Commission order and (2) a subsequent Commission modification is required solely in order to enforce a finding by the Supreme Court of Ohio. Breaking that down, OEG believes that R.C. 4928.143(C)(2)(a) should be interpreted to mean that a utility's right of withdraw applies only in cases where a proposed ESP application is voluntarily modified by the Commission—through initial Order or an Entry on Rehearing—and not when an ESP already the subject of a final, appealable order is subsequently modified due to a mandate by the Supreme Court of Ohio. OEG asserts that ESP III is not a proposed SSO; instead, it results from the Commission's October 20, 2017 Opinion and Order, which OEG alleges is a final, appealable order. OEG further asserts that the Commission did not voluntarily modify ESP III by removing the DMR, but did so only because of a decision of the Ohio Supreme Court. Therefore, given OEG's proffered interpretation of R.C. 4928.143(C)(2)(a), DP&L has no statutory right to withdraw. OEG adds that to interpret the statute differently essentially grants utilities an indefinite right to withdraw its ESP.

#### ***B. Commission Conclusion***

{¶ 16} The Commission finds that, under R.C. 4928.143(C)(2)(a), DP&L has an absolute statutory right to withdraw its Application for ESP III, thereby terminating it, and that nothing in the Amended Stipulation constitutes a waiver of that right. R.C. 4928.143(C)(2)(a) unambiguously provides:

If the Commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or under [R.C. 4928.142].

Stated simply, R.C. 4928.143(C)(1) requires that the Commission issue an order that does “one of three things: (1) approve, (2) modify and approve, or (3) disapprove the application.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 24. The Supreme Court of Ohio has “stated on numerous occasions that if the meaning of a statute is clear on its face, then it must be applied as it is written.” *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E. 2d 611 (1994). Thus, a plain reading of R.C. 4928.143(C)(2)(a) demonstrates that the only statutory precondition to the utility’s right to withdraw the application is that the Commission modify and approve the application by order. The Commission issued the November 21, 2019 Supplemental Opinion and Order modifying and approving DP&L’s Application for ESP III. No other action need occur to trigger DP&L’s statutory right under R.C. 4928.143(C)(2)(a) to withdraw that application, thus terminating ESP III.

{¶ 17} The Commission finds the Responding Parties’ arguments that the Withdrawal Provision limits this absolute statutory right to be unpersuasive. The Withdrawal Provision’s terms are limited to the signatory parties’ rights to withdraw from the Amended Stipulation: “If the Commission reject or modifies all or any part of this Stipulation \* \* \* a Signatory Party may withdraw from the Stipulation” or “DP&L may terminate and withdraw from the Stipulation.” (Emphasis added.) Jt. Ex. 1 at 38. The Withdrawal Provision contains no limiting terms or provisos regarding DP&L’s right to withdraw its Application under R.C. 4928.143(C)(2)(a); in fact, the Withdrawal Provision is utterly silent as to the statute. The Commission notes that Dayton and OPAE assert in their reply that, under the Withdrawal Provision, the “Utility Notice does not reference the Stipulation in any way and addresses the unique rights utilities have under R.C. 4928.143 which are independent of any stipulation.” Reply Brief at 2-3. The Commission disagrees with the first assertion and agrees with the latter. The Withdrawal Provision specifically



provides that “[u]pon the filing of [a] Utility Notice by DP&L, the Stipulation shall immediately become null and void.” Jt. Ex. 1 at 38. This sentence unequivocally links the Utility Notice to the Stipulation and fails to invoke any statutory authority under R.C. 4928.143. The Commission agrees, however, that DP&L’s unique rights under the statute are independent of any stipulation. The Amended Stipulation and the Application are distinctly different documents affording distinctly different rights and responsibilities. Withdrawal of the Amended Stipulation would return this proceeding to the point immediately before the Amended Stipulation was filed, and the Commission would schedule a hearing on the Application. Withdrawal of the Application, however, effectively terminates this proceeding and requires DP&L to file a new application for an SSO. In light of the fact that DP&L withdrew from ESP II, it was certainly foreseeable that DP&L may seek to withdraw from ESP III if the Commission modified and approved the ESP. If the parties intended to limit DP&L’s ability to withdraw the Application, they could have done so by including language to that effect. They did not. The Commission may not, and will not, rewrite the Amended Stipulation by interpreting the Withdrawal Provision as urged by the Responding Parties. “To construe or interpret what is already plain is not interpretation but legislation \* \* \*.” *Lake Hosp. Sys., Inc.*, at 524.

{¶ 18} The Commission further finds that DP&L did not waive its statutory right under R.C. 4928.143(C)(2)(a). In support of their waiver argument, Dayton and OPAE cite two cases from the Supreme Court of Ohio. First, they cite to *Shank*, 57 Ohio St.3d 178, 566 N.E.2d 1215 (1991), in which the Court reaffirmed that “the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy.” *Shank* at 180-181, quoting *State ex rel. Hess v. Akron*, 132 Ohio St. 305, 307, 7 N.E.2d 411. The *Shank* Court further opined that the statutory right to a discretionary appeal could be waived where the aggrieved party knew of the right, intended to waive that right, and gave and received sufficient consideration for waiving that right. *Shank* at 180. Second, Dayton and OPAE cite to *Athens Cty. Bd. Of Commrs.*, 75 Ohio St.3d 611, 1996-Ohio-68, 665 N.E.2d 202,

in which the Court relied on *Shank* in similarly determining that a party may validly waive a statutory right where such waiver does not violate public policy.

{¶ 19} *Shank* and *Athens Cty. Bd. of Commrs.*, however, present factual circumstances not present in this proceeding and are, therefore, distinguishable. Specifically, the settlement agreements at issue referred specifically to the statutory right being waived. In *Shank*, that right was the aggrieved party's discretionary right to appeal from action taken by the Director of the Ohio Environmental Protection Agency conferred by R.C. 3745.04. Although the statute itself was not explicitly referenced in the settlement agreement, the aggrieved party had specifically "waived '\* \* \* his right to contest the [lawfulness] and reasonableness of [the] Director's Findings and Orders before the Environmental Board of Review or any court of competent jurisdiction.'" *Shank* at 180. Similarly, in *Athens Cty. Bd. of Commrs.*, the rights at issue involved the apportionment and distribution of assets of solid waste management districts discussed by R.C. 343.012. In reaching the conclusion that Athens and Hocking Counties had, by written agreement, waived any claim to a greater distribution of assets that they may have had under the statute, the Supreme Court of Ohio noted:

The settlement agreement specifically referred to the R.C. 343.012(B) division of district assets and provided that Athens and Hocking Counties "release and forever discharge the Athens, Gallia, Hocking, Jackson, Meigs, and Vinton Joint Solid Waste Management District, their successors and/or assigns, from all debts, claims, demands, damages, actions, causes of action whatsoever, past, present or future which can or may ever be asserted.

*Athens Cty. Bd. of Commrs.*, at 616-617.

{¶ 20} Here, however, the Amended Stipulation's Withdrawal Provision does not reference the right created by statute or the statute creating that right. Instead, the Withdrawal Provision outlines the parties' rights and responsibilities with regard to withdrawing from the Amended Stipulation. The parties' rights to withdraw from the Amended Stipulation are separate and distinct from the EDU's statutory right to withdraw

the ESP application. Where, such as here, the agreement is silent as to the right created under R.C. 4928.143(C)(2)(a), the Commission cannot find that DP&L waived that right by executing the Amended Stipulation.

{¶ 21} Lastly, the Commission finds the arguments that DP&L lacks statutory authority to act under R.C. 4928.143(C)(2)(a) to be misplaced. First, the Commission notes that this proceeding is in the exact posture OEG proposes an absolute right to withdrawal is granted by R.C. 4928.143(C)(2)(a): the impacted ESP is the product of a Commission order that is not yet final or appealable and no subsequent modification is required to enforce a finding by the Supreme Court of Ohio. Second, in arguing that the Commission modified and approved the Amended Stipulation and not the Application, OCC/OMAEG/Kroger/IGS attempt to establish a difference without distinction. As stated above, R.C. 4928.143(C)(1) requires the Commission to either approve, modify and approve, or disapprove an application for an ESP filed under R.C. 4928.143(A). *Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 24. The entire point of a stipulation is to provide the Commission with a recommendation to resolve the issues presented by an application. In this case, Commission issued a Supplemental Opinion and Order that modified the Application for ESP III by eliminating the DMR proposed in the Application; therefore, DP&L has an absolute statutory right to withdraw the Application. “If the Commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application. *Ohio Power Co.*, at ¶ 26.

{¶ 22} In conclusion, the Commission approves DP&L’s Notice withdrawing its application for an ESP, thereby terminating ESP III. Accordingly, the Commission finds that this case should be dismissed.

## V. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That DP&L's notice of withdrawal of its application in Case No. 16-395-EL-SSO be approved. It is, further,

{¶ 25} ORDERED, That Dayton and OP&E's motion to strike be denied. It is, further,

{¶ 26} ORDERED, That this case be dismissed. It is, further,

{¶ 27} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

COMMISSIONERS:

*Approving:*

Sam Randazzo, Chairman

M. Beth Trombold

Daniel R. Conway

Dennis P. Deters

*Recusal:*

Lawrence K. Friedeman

PAS/hac

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**Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM**

Summary: Finding & Order that the Commission finds that the Dayton Power and Light Company has a statutory right to withdraw its application for an electric security plan and, therefore, approves the notice of withdrawal. The Commission further finds that the withdrawal effectively terminates the electric security plan and that this proceeding should be dismissed. electronically filed by Docketing Staff on behalf of Docketing.