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 APPLICATIONS FOR REHEARING**

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I. INTRODUCTION AND SUMMARY

The Commission should reject the Applications for Rehearing filed by The Office of the Ohio Consumers' Counsel ("OCC"), The Ohio Manufacturers' Association Energy Group ("OMA"), The Kroger Company ("Kroger"), Interstate Gas Supply, Inc. ("IGS") and Industrial Energy Users-Ohio ("IEU") for the following reasons:

First, OCC argues that the term "standard service offer" in R.C. 4928.143(C)(2)(b) is limited to the supply of generation, so that when DP&L terminated its third Electric Security Plan ("ESP III"), the Commission should have implemented DP&L's prior generation rates, but not the remaining terms of DP&L's ESP III. As demonstrated below, that argument is inconsistent with the plain terms of Chapter 4928, which establishes that an ESP is an SSO.

Second, various intervenors argue that the Commission should not have included the Rate Stability Charge ("RSC"), when the Commission reinstated ESP I after DP&L terminated ESP III. Those arguments have a host of defects, including that the governing statute provides that the Commission "shall" implement prior rates. R.C. 4928.143(C)(2)(b).

Third, intervenors argue that the Commission should not have allowed DP&L to recover storm and transmission costs under ESP I. The principal defect in that argument is that the Stipulation and Recommendation in ESP I expressly authorizes DP&L to recover those costs.

Fourth, IEU argues that the Commission should continue the economic development benefits from ESP III. Not only has the Commission already rejected that argument in ESP III, but also, continuing those terms would be inconsistent with DP&L's right to terminate ESP III. R.C. 4928.143(C)(2)(a).

Finally, IGS argues that the Commission should eliminate the supplier collateral requirements in DP&L's tariffs. However, those terms were approved in a separate, recent DP&L case.

II. AN ESP IS AN SSO

OCC (pp. 1-6) argues that the Commission erred in reinstating DP&L's ESP I. According to OCC, a "standard service offer" ("SSO") is not an "electric security plan" ("ESP"), but instead, an SSO is limited to the "supply of generation" (p. 3). OCC thus asserts that when DP&L reverted back to its prior SSO under division 4928.143(C)(2)(b) after ESP III was terminated, the Commission was required to reinstate DP&L's prior generation rates, but not the remaining terms of ESP I. The Commission should reject that argument because Chapter 4928 unambiguously establishes that an SSO is either an ESP or a market rate offer ("MRO"), and is not limited to the supply of generation.

Specifically, R.C. 4928.141 states:

> "Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. . . . . A standard service offer under section 4928.142 or 4928.143 of the

> Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan." (Emphasis added.)

The fact that that section refers to an SSO "in accordance with" or "under" the ESP and MRO statutes makes plain that an SSO is either an ESP or an MRO.

Further, R.C. 4928.143(A) and (B)(1) & (2) state:

> "(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. . . .
>
> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> (1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. . . .
>
> (2) The plan may provide for or include, without limitation, any of the following: . . . ." (Emphasis added).

Division (B)(1) relates to the supply of generation, while division (B)(2) authorizes the ESP to contain a variety of other provisions. Under OCC's theory, division (B)(1) would be the division that established the obligation of a utility to provide an SSO, since that section addresses the obligation to provide generation service. Further under OCC's theory, divisions (B)(2)(a) - (i) are components of an ESP, but not an SSO. However, that theory is misplaced for three reasons:

First, R.C. 4928.143(A) states that "[f]or the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section." As discussed above, Section 4928.141 requires utilities to provide a "standard service offer in accordance with Section 4928.142 or 4928.143." If OCC's theory was correct -- i.e., that an SSO is approved only under (B)(1) -- then subsection (A) would state "for the purpose of complying with Section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B)(1) of this section."

However, that is not what division (A) states. The fact that a utility can comply with its Section 4928.141 obligation to provide an SSO by filing for an ESP that includes terms from either division (B)(1) or (B)(2) necessarily means that divisions (a) - (i) under division (B)(2) are components of an SSO.

In other words, an SSO must include terms under either division (B)(1) or (B)(2), because otherwise division (A) would make no sense. When division (A) says that to "comply[] with Section 4928.141" -- i.e., to supply an SSO -- the utility may include terms under division (B), that necessarily means that an SSO under R.C. 4928.141 may include terms authorized by either division (B)(1) or (B)(2).

Second, if OCC's theory was correct, then division (B)(1) would have been written to state that "an electric security plan shall include provisions relating to the supply and pricing of an SSO." However, that is not what that section says. Instead, it refers to the "supply and pricing of electric generation service." The fact that division (B)(1) does not refer to SSO but instead refers to "generation service" confirms that the two are not synonymous.

Third, under R.C. 4928.143(C)(2)(b), the Commission was required to implement all of the "provisions, terms, and conditions" of DP&L's most recent SSO. The requirement that the "provisions, terms, and conditions" be implemented would make no sense if that section required only that the prior generation rates be reinstated. The requirement that all of the "provisions, terms, and conditions" of the most recent SSO be implemented necessarily means that the entire ESP was to be implemented.

Indeed, in a motion that OCC filed less than two month ago, OCC asserted that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" required the Commission "to implement ESP I after withdrawal":

> "By statute, the Commission is limited to authorizing a return to the EDU's most recent ESP together with necessary fuel-cost adjustments. Where a statute is <u>unambiguous</u>, it must be enforced according to its terms. Applying that interpretive principle, the Commission should conclude that its powers under R.C. 4928.143(C)(2)(b) were limited to <u>authorizing DP&L to implement its ESP I</u> after withdrawal . . . ."

Dec. 4, 2019 Motion to Reject DP&L's Proposed Tariffs, p. 13 (emphasis added).

In short, as established in R.C. 4928.141, an SSO is either an ESP or an MRO. When section 4928.143(C)(2)(b) provides that a utility shall revert to its most recent SSO, it means that DP&L must revert to ESP I.

III. <u>THE COMMISSION'S ORDER APPROVING THE RSC WAS LAWFUL</u>

Various intervenors argue that the Commission erred by allowing 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 Commission already has rejected those arguments:

> "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. . . .

* * *

[W]e 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.' . . . '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.' . . . '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.' . . . 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.

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.

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.' . . . Therefore, collateral estoppel and res judicata bar OHA and Consumer Groups from raising this claim now.

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."

Dec. 18, 2019 Second Finding & Order, ¶¶ 29-35.

The Commission's decision was correct, and therefore, the Commission has no need to reconsider it. To the extent that the Commission is inclined to reconsider that decision, DP&L demonstrates below that the Commission was obligated to approve the RSC.

A. The Intervenors Ignore the Plain Language of the Governing Statute

The principal defect in the intervenors' arguments is that they ignore the plain language of 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)(b):

> "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 SSO 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 this case.

The intervenors ignore the plain language of R.C. 4928.143(C)(2)(b). Only OCC contests whether the RSC was a provision or term of DP&L's most recent SSO (and OCC's argument is flawed, as demonstrated above). They do not contest that the word "shall" is mandatory or explain how or why the Commission could ignore that word. In fact, as discussed above, OCC asserted that R.C. 4928.143(C)(2)(b) "unambiguous[ly]" required the Commission "to implement ESP I after withdrawal." Dec. 4, 2019 Motion to Reject DP&L's Proposed Tariffs, p. 13.

The intervenors 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, several intervenors have admitted elsewhere that R.C. 4928.143(C)(2)(b) requires the Commission to implement ESP I. For example, 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. The General Assembly used the word 'shall' leaving the PUCO no choice but to return to 'the utility's most recent standard service offer.'"

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 SSO.

Similarly, OMA and Kroger stated in their merit briefs:

> "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 * * *.' There is no uncertainty with that provision. 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, 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 . . ."

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.

IEU argues (pp. 15-16) that the RSC should be conditionally "bypassable for shopping customers that agree to return to the SSO at market-based rates." That argument is flawed because R.C. 4928.143(C)(2)(b) provides that the Commission "shall" implement

DP&L's prior SSO. The RSC was not conditionally bypasssable for individual customers in DP&L's prior SSO.

Honda/Dayton (pp. 9-11) and Kroger/OMA (pp. 5-7) attempt to establish that the Commission had the power to eliminate the RSC under R.C. 4928.143(C)(2) because the Commission previously removed the Environmental Investment Rider ("EIR") and honored competitive bid contracts that were not a part of the ESP I. To that end, the Intervenors argue that the Commission should have employed the same "flexibility" to remove the RSC. As an initial matter, the word "shall" in R.C 4928.143(C)(2)(b) refutes the intervenors' arguments that the Commission has flexibility. In addition, the Intervenors arguments are built upon a fundamental misunderstanding of the reversion. DP&L is not reverting back to the ESP I from 2009. DP&L is reverting back to its "most recent standard service offer" prior to the approval of ESP III. That standard service offer was in place from September 1, 2016 through November 1, 2017 in accordance with the Commission's August 26, 2016 Finding and Order in this case.

The August 26, 2016 Finding and Order established a standard service offer that did not include recovery of the EIR. The Finding and Order also implemented a competitive bid process based upon currently executed contracts. The Order also included the re-implementation of the RSC. That is precisely what the Commission has approved in its December 18, 2019 Second Finding and Order.

Alternatively, carrying the Intervenor argument out to its logical conclusion would mean that the Commission should reinstate the EIR and allow DP&L to suspend its competitive bid contracts and begin securing generation as it originally did under ESP I, not remove the RSC. Certainly, no intervenor would argue for such an outcome on behalf of customers.

IEU (pp. 10-12), OCC (pp. 21-23) and Kroger/OMA (pp. 8-13) argue that it is unjust and unreasonable to implement the RSC. However, R.C. 49281.143(C)(2) does not require a review of the provisions, terms, and conditions of the utility's most recent standard service offer. That section simply requires that 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." The Commission has done so.

IEU (pp. 13-15) argues that DP&L has not supported the RSC with evidence showing that it is reasonable. However, there is no requirement that DP&L submit evidence, since the R.C. 4928.143(C)(2)(b) provides that the Commission "shall" implement DP&L's prior SSO.

In short, the intervenors have ignored the plain language of 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 ESP I, which includes the RSC.

B. <u>The Intervenors Are Barred from Challenging the RSC</u>

1. <u>Res</u> <u>Judicata</u> and collateral estoppel bar the intervenors' <u>arguments</u>

The Commission also correctly held that the intervenors are barred by R.C. 4903.10 and the doctrines of <u>res judicata</u> 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 IEU, Honda, Dayton, OCC, OMA and Kroger (among others). Feb. 24, 2009 Stipulation and Recommendation, pp. 21-22 (Case No. 08-1094-EL-SSO). That Stipulation contained the RSC. Id. ¶ 3. 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 those parties signed that ESP I Stipulation. They were thus 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.").

Those parties 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, the intervenors 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 ESP 1 including the RSC if the Commission modified DP&L's next ESP application. The intervenors are thus barred by R.C. 4903.10, res judicata and collateral estoppel from challenging the RSC now.

2. DP&L still provides POLR service

OCC (pp. 20-23), IEU (pp. 14-15) Honda/Dayton (pp. 4-5) and Kroger/OMA (p. 12) argue that DP&L is no longer subject to a provider of last resort ("POLR") risk, and that there has been a "change in fact" that establishes that the doctrines of res judicata and collateral estoppel are not applicable. 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 still provides POLR service.

The intervenors 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. . . . 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).

The Commission correctly held that DP&L still retains its POLR obligations. Therefore DP&L is still subject to POLR risks for the following reasons.

First, the auctions are conducted periodically, and there is no guarantee 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. Generation service within the SSO 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 or are on a variable rate with a competitive supplier; in that instance, it may be cheaper for them to return to the fixed-price generation service under the SSO. Those customers should then be served by the winning bidders from prior auctions, 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 or willing to supply the additional generation required for the 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.)

OMA/Kroger (p. 12) and OCC (p. 19) argue that DP&L is no longer subject to POLR risk since it no longer owns generation assets, but that argument demonstrates a fundamental misunderstanding of POLR risk. DP&L has POLR risk because it has a statutory obligation to provide generation if there are no other providers. DP&L thus has POLR risk whether it owns generation assets or not. Indeed, DP&L's POLR risk is likely higher now that it no longer owns generation assets, since DP&L cannot access that generation to satisfy its statutory obligations if a winning bidder or CRES defaults.

The Supreme Court of Ohio has acknowledged that POLR obligations impose risks on a utility. Constellation NewEnergy, Inc. v. Pub. Util. Comm. of Ohio, 104 Ohio St.3d 350, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 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., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 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.'") (citations omitted).

The Commission should thus reject the argument by the intervenors that DP&L no longer has a POLR obligation and risk.

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). While the debate of the lawfulness of implementing the RSC should stop there, this section of DP&L's Opposition demonstrates that independent of the R.C. 4928.142(C)(2)(b), the RSC is lawful.

1. **Most of the intervenors ignore two rulings by the Court that the RSC is lawful**

Continuing their pattern of ignoring controlling law that is adverse to their position, most of the intervenors ignore the two Supreme Court cases that have held that DP&L's RSC is lawful. Constellation NewEnergy, 2004-Ohio-6767, ¶¶ 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 (also called the Rate Stabilization Surcharge ("RSS") in earlier cases) 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: 'An 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. Thus, we find no error in the commission's findings as to the RSS mechanism."

Constellation, 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. The commission's approval of the rate and amount is in conformity with applicable law. . . .
>
> 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, the rate-stabilization surcharge would compensate DP&L for the risks and costs that DP&L will incur as a POLR. 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).

Kroger/OMA (pp. 9-11) attempt to distinguish those decisions by the Court on the ground that the issue of whether the RSC was a transition charge was not before the Court in those cases. Not only is that argument barred because Kroger/OMA should have raised it in ESP I, but also, DP&L addresses whether the RSC constitutes a transition charge in the next section of this Opposition. Among other points, the Court decided in 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, that the "notwithstanding" clause in RC 4928.143(B) bars parties from arguing that otherwise lawful ESP charges are unlawful transition charges.

Several intervenors cite In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (2011), but their reliance on that decision 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.

2. The RSC is not an unlawful transition charge

OMA/Kroger (pp 10-11) argue 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; "[t]o 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). The fact that In re Application of Columbus S. Power was issued after ESP I initially was approved thus does not bar the application of res judicata in this case.

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 (emphasis added; 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). The 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, 2018-Ohio-4698, ¶ 19. In re Ohio Power thus establishes that the RSC is lawful "notwithstanding" the arguments of the intervenors that it is a transition charge.

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

OCC (pp. 19-23) and IEU (pp 12-13) argue that the RSC is a "financial integrity" charge, and is thus barred by the Commission's 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, as demonstrated above, the RSC compensates DP&L for POLR risks to which it is subject, and it is not a "financial integrity" charge. Accord: Dec. 18, 2019 Second Finding & Order, ¶ 40. ("We are not persuaded that the RSC, as a POLR charge, is 'an equivalent economic stability charge' pursuant to the amended stipulation.")

Third, the fact that DP&L needs the RSC to maintain its financial integrity does not mean that the RSC 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.

D. The Commission Appropriately Refrained from Requiring Tariffs be Made "Subject to Refund"

OCC (pp. 28-32) argues that the Commission should have ordered DP&L to implement its tariffs, namely the RSC, with language identifying the charge as "subject to refund." As an initial matter, the Commission should reject OCC's argument because the RSC was not subject to refund under ESP I. The Commission is required to ("shall") implement the "provisions, terms and conditions" of ESP I (R.C. 4928.143(C)(2)(b)), and since the RSC was not subject to refund under ESP I, it cannot be subject to refund now.

In any event, refunds are barred by long-standing precedent by the Supreme Court. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2 ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."). Accord: id. at 257 ("Under [R.C. 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.") (emphasis added).

Moreover, a refund would violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Comm'rs v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

In addition, making DP&L's rates subject to refund would violate the important public policies of rate stability for customers of utilities. Rates collected by a utility are used either to pay its costs, pay debt, or issue dividends to shareholders. Requiring a utility to refund amounts that it has already expended would create uncertainty and unnecessary financial stress on a utility, jeopardizing a utility's ability to provide safe and reliable service to its customers. Allowing rates to be subject to refund would also make the utility a much more risky entity, which would increase its cost of capital, and ultimately lead to higher rates for customers.

The no-refund/no-retroactive-ratemaking rules strike a balance between the interests of utilities and customers. Specifically, when a utility files for a rate increase, it cannot implement the increase until the Commission considers the request and issues an order, a process that typically takes about a year. Under the no-retroactive-ratemaking rule, the new rates will be prospective only, i.e., the utility typically cannot recover the increased costs that it incurred before its application was filed or while that application was pending. That regulatory delay in recovering costs occurs in almost every case in which a utility seeks a rate increase. On the other hand, the no-refund rule allows the utility to retain amounts that the Commission authorized, but that the Court later invalidates. Stability is important, especially when the possibility of a refund occurs so rarely. The statutory process for setting rates embraces a public policy and strikes a reasonable balance between a utility's needs to recover costs and protecting customers from paying unlawful charges. Accord: In re Application of Ohio Edison Co., Fifth Entry on Rehearing, ¶ 209 (Case No. 14-1297-EL-SSO) (rejecting argument that rate should be subject to refund because doing so would "impose additional risks on the companies").

Indeed, the Supreme Court has discussed why the no-refund rule is sound policy:

> "It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

Keco Industries, Inc., 166 Ohio St. at 259 (quoting trial court).

OCC's (pp. 29-30) reliance on older commission precedent is misplaced, because ordering rates subject to refund is inconsistent with those policies. In addition, the In re Columbus & Southern Ohio Electric Company (Case No. 81-1058-EL-AIR) and Ohio Utilities

Company (Case No. 77-1073-WS-COI) cases cited by OCC (pp. 29-31) both involved changes in the applicable law – in one case, by the Nuclear Regulatory Commission and in the other, by the Ohio General Assembly – that occurred after the Commission decided the cases. Those events changed the legal underpinnings of the rate orders in question. Because of the questions raised by those subsequent changes in the law, the Commission ordered the companies to collect the approved rates subject to refund. But this case is different. Here, as demonstrated above, there have been no changes in the law that would suggest that the RSC is unlawful. The Commission thus should not approve it subject to refund.

Further, OCC's reliance (p. 30) on the Commission's May 18, 2016 Entry in Case No. 10-2929 is misplaced because the utility consented to making its rates subject to refund. May 17, 2016 Memorandum Contra, p. 6. Making rates subject to refund in that case was thus reasonable, since it was suggested by the utility.

In short, as demonstrated above, the no-refund rule and the no-retroactive-ratemaking rule strike a reasonable balance between the interests of the utility and its customers. The no-retroactive-ratemaking rule prevents the utility from recovering increased costs incurred before a Commission order, while the no-refund rule prevents customers from recovering increased costs after a Commission order. There is a rational balance between those two rules, with which the Commission should not interfere.

IV. THE COMMISSION'S DECISIONS ON OTHER RIDERS WAS LAWFUL

A. Distribution Rates

OCC argues (pp. 6-8) that the Commission should issue an order barring a future distribution rate case filing by DP&L. The Commission should reject that argument for the following separate and independent reasons.

First, OCC failed to raise that argument in response to the Commission's Entry establishing a comment period on DP&L's proposed tariffs. Dec. 4, 2019 Memorandum Contra by OCC, pp. 1-14; Dec. 4, 2019 Motion to Reject DP&L's Proposed Tariffs, pp. 1-16. OCC has thus waived the argument. City of Parma v. Pub. Util. Comm., 86 Ohio St. 3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred").

Second, the Commission effectively modified the distribution rate freeze provision in the ESP I Stipulation when the Commission later approved the Stipulation in DP&L's distribution rate case. Specifically, the Stipulation in DP&L's distribution rate case provides that DP&L may file a distribution rate case "on or before October 31, 2022" to maintain its DIR. June 18, 2018 Stipulation and Recommendation, p.7 (Case No. 15-1830-EL AIR). That Stipulation was signed by OCC (p. 17) and approved by the Commission. That Stipulation – which became effective after the ESP I Stipulation – thus establishes that DP&L has the right to file a distribution rate case.

B. Storm Rider and TCRR

Honda/Dayton (pp 10-11), OMA/Kroger (pp. 5-8), OCC (pp. 10-19) and IEU (pp. 7-9) argue that the Commission erred in continuing the Storm Rider and/or TCRR. On that issue, the Commission stated:

> "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."

Dec. 18, 2019 Second Finding & Order, ¶ 39.

As demonstrated below, that decision was correct:

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.").

OCC (pp. 14-17) further argues that DP&L should not be permitted to recover 2017-2019 storm costs because they were approved as part of the ESP III. To support this argument, OCC reads the ESP I Stipulation to encompass a narrow recovery of storm costs incurred from 2008 through 2013 (id. at p. 17). In doing so, OCC reads a "quid pro quo" into the language of the ESP I Stipulation that did not exist and ignores the fact that OCC has subsequently agreed to DP&L filing future distribution rate cases. See supra, Section IV.A. Moreover, the language of ESP I has no such time limitation, quite clearly permitting DP&L to recover "[t]he cost of storm damage." Feb. 24, 2009 Stipulation and Recommendation, p. 11.

DP&L has been entitled to seamless storm cost recovery via the 2016 standard service offer terms and conditions from ESP I, through ESP III, and now the reversion back to the 2016 standard service offer terms and conditions. DP&L has retained the right to defer and collect storm costs through the entire period. DP&L has already been granted authority to recover the storm costs incurred from 2016 through 2018,[1] and has even collected a significant portion. In an attempt to end-run the well-established retroactive ratemaking principles and clear review process set forth in R.C. 4903.10 through R.C. 4903.13, OCC is now employing a collateral attack and gamesmanship on the 2018 and 2019 storm cases to which OCC was a party and did not file an application for rehearing.

TCRR-N: Regarding the TCRR-N, the Commission further stated:

> "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, [Commission discussed competitive bidding.] Second, the Commission continued DP&L's transmission cost recovery riders, TCRR-B (bypassable) and TCRR-N (nonbypassable), approved by ESP III, in order to avoid unduly disrupting both the CBP supplying the SSO and individual

[1] *See*, PUCO Case No. 18-77-EL-RDR, Dec. 19, 2018 Finding and Order; PUCO Case No. 18-381-EL-RDR, Sept. 26, 2019 Finding and Order; PUCO Case No. 19-662-EL-RDR, Oct. 23, 2019 Finding and Order.

> 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."

Dec. 18, 2019 Second Finding and Order, ¶ 28.

The Commission was correct. Specifically, the ESP I Feb. 24, 2009 Stipulation and Recommendation, ¶ 19.c authorizes the recovery of "TCRR" costs. Further, when the Commission implemented ESP I rates after DP&L withdrew ESP II, the Commission expressly continued the recovery of TCRR costs in the same manner. Aug. 26, 2016 Finding & Order, ¶ 24. The recovery of TCRR costs in a particular way (i.e., bypassable and non-bypassable components) was thus included in DP&L's prior ESP (i.e., ESP I after ESP II was terminated), and the Commission was required by R.C. 4928.143(C)(2)(b) to continue those terms.

Kroger/OMA argue (pp. 5-8) that the Commission erred by approving a "blended" ESP. However, the specific provisions that they challenge are the RSC, the TCRR recovery costs and storm cost recovery. As demonstrated above, all of those items were part of DP&L's ESP I rates after ESP II was withdrawn, and the Commission was required to implement them pursuant to R.C. 4928.143(C)(2)(b).

V. ECONOMIC DEVELOPMENT CHARGES

IEU argues (pp. 2-10) that the Commission should have continued the economic development provision from the ESP III Stipulation. The Commission rejected that argument in ¶ 110 of its November 21, 2019 Supplemental Opinion & Order (Case No. 16-0395-EL-SSO) and should reject IEU's argument again for two additional reasons.

First, DP&L had a statutory right to terminate ESP III under R.C. 4928.143(C)(2)(a), and DP&L has exercised that right. Nov. 26, 2019 Notice of Withdrawal (Case No. 16-0395-EL-SSO). As the Commission found, the continuation of the economic development provision from the ESP III Stipulation would violate not only the Commission's November 2019 Order, but also DP&L's statutory right to terminate ESP III in its entirety. Dec. 18, 2019 Second Finding & Order, ¶ 40. This is because termination under R.C. 4928.143(C)(2)(a) removes the entire ESP III application as well as the Stipulation and all of its terms and conditions. Further, DP&L has already refuted IEU's argument that the Commission's prior rulings on the storm rider, the TCRR, and EIR show that the Commission has flexibility under R.C. 4928.143(C)(2)(b).

Second, even if ESP III still existed, under the terms of the ESP III Stipulation, those economic development benefits terminated "when the DMR expires, or when an equivalent economic stability charge intended to provide financial stability to DP&L or DPL Inc., whether proposed in this case or another proceeding, expires." Amended Stipulation and Recommendation, pp. 10-11 (Case No. 16-0395-EL-SSO). As demonstrated above, the RSC is a POLR charge, not a financial integrity charge. Accord: Dec. 18, 2019 Second Finding & Order, ¶ 40 ("We are not persuaded that the RSC, as a POLR charge, is 'an equivalent economic stability charge' pursuant to the amended stipulation.")

VI. SUPPLIER TERMS

IGS asserts that DP&L's collateral requirements should revert to the tariff provisions that were in place in ESP I. However, that issue already has been litigated in DP&L's recent distribution rate case.

Specifically, in DP&L's distribution rate case, IGS raised the issue of DP&L's collateral requirements in IGS' objections to the Staff Report. Apr. 11, 2018 Objections to Staff Report by IGS, pp. 9-10 (Case No. 15-1830-EL-AIR). IGS continued to litigate that issue in its post-hearing brief in that rate case. Aug. 17, 2018 Initial Brief of IGS, pp. 30-32 (Case No. 15-1830-EL-AIR).

DP&L argued that a distribution rate case was not the appropriate forum for litigating the requirements of supplier terms. Aug. 17, 2018 DP&L Post Hearing Brief, p. 12 (arguing that DP&L's generation tariffs should not be reviewed in a distribution rate case). IGS took the opposite position, and argued that the Commission should review those tariff terms in the distribution rate case. Aug. 17, 2018 Initial Brief of IGS, p. 8. The Commission sided with IGS on that narrow issue, and held that it should consider the supplier terms -- including the collateral requirements -- in the distribution rate case. Sept. 26, 2018 Opinion and Order, ¶¶ 35, 44-48 (Case No. 15-1830-EL-AIR).

However, the Commission ultimately approved DP&L's tariff terms regarding collateral:

> "The Commission finds that the evidence in the record does not support modification of the credit and collateral requirements in the Supplier Tariff. As DP&L notes, the Supplier Tariff does not distinguish between public and private companies; the Supplier Tariff provides that companies, public or private, which have established their creditworthiness by obtaining an investment grade

> credit rating need not post collateral. The record demonstrates that there is nothing to stop private companies from obtaining credit ratings. Nonetheless, if any CRES provider believes that the differential treatment is unduly discriminatory, it should seek mediation from the Staff or file a complaint with the Commission."

Sept. 26, 2018 Opinion and Order, ¶ 47 (Case No. 15-1830-EL-AIR).

In short, IGS successfully argued that DP&L's distribution rate case was an appropriate forum to litigate its challenges to DP&L's collateral requirements. Having then lost the issue as to their reasonableness, IGS should not be permitted to re-litigate that issue here.

VII. CONCLUSION

The Court should reject the applications for rehearing filed by the intervenors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Applications for Rehearing has been served via electronic mail upon the following counsel of record, this 3rd day of February, 2020:

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