FILE

IN THE SUPREME COURT OF OHIO

In re Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	Case No. 2021-1068
In re Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	
In re Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	)	Appeal from the Public Utilities Commission of Ohio
In re Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	)	Pub. Util. Comm. Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

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NOTICE OF APPEAL
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio of this appeal. This appeal from PUCO Orders is taken to protect DP&L's approximately 500,000 consumers from rates for electric service that are unjust and unreasonable and include charges for so-called stability, which this Court has consistently struck down. *See In re Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179; *In re Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734.

We appeal the PUCO decisions permitting DP&L to once again revert to its first electric security plan approved by the PUCO in 2009. DP&L's latest withdrawal from its electric security plan was permitted after the PUCO put a stop to DP&L's so-called distribution modernization rider. But unfortunately for consumers, DP&L had already charged them $218 million, which was not refunded. The PUCO's disallowance of DP&L's distribution charge was in response to this Court's ruling striking down a similar distribution charge that FirstEnergy had imposed on its consumers. *See In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906.

The decisions being appealed are the PUCO's decisions that approved DP&L's second withdrawal from an electric security plan. The PUCO decisions allowed DP&L to selectively implement certain provisions of its electric security plan rates approved eleven years ago and approved charges that were without record support. OCC is appealing the PUCO's Sixth Entry on Rehearing entered in its Journal on August 11, 2021 (Attachment A), the PUCO's Fifth Entry on Rehearing, dated June 16, 2021 (Attachment B) and the PUCO's

Second Finding and Order of December 18, 2019 (Attachment C).[1] The PUCO stymied OCC's statutory right to appeal and the Court's statutory right to review PUCO orders by delaying a decision on rehearing for more than sixteen months, while DP&L continued to charge Dayton-area consumers.

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

On January 17, 2020, OCC filed an Application for Rehearing from the PUCO's December 18, 2019 Second Finding and Order, in accordance with R.C. 4903.10. By Entry dated February 14, 2020, the PUCO granted rehearing for further consideration of the matters specified in numerous parties' applications for rehearing. Sixteen months later, after OCC filed a complaint in procedendo against the PUCO, *State of Ohio ex rel. Office of the Ohio Consumers' Counsel v. Jenifer French,* S.Ct. Case No. 2021-0456, the PUCO issued a Fifth Entry on Rehearing on June 16, 2021. The PUCO stymied OCC's statutory right to appeal and the Court's statutory right to review PUCO orders by delaying a decision on rehearing for more than sixteen months, while DP&L continued to charge Dayton-area consumers. Once the PUCO issued its Fifth Entry on Rehearing, the Court dismissed OCC's writ. *Id.*, 2021-Ohio-2795.

OCC timely filed an application for rehearing on the Fifth Entry. Finally, on August 11, 2021, the PUCO issued its Sixth Entry on Rehearing. In that Entry, it denied all parties' applications for rehearing, including OCC's, rendering it a final, appealable order.

OCC files this Notice of Appeal complaining of errors in the PUCO's Sixth Entry on Rehearing (Aug. 11, 2021), its Fifth Entry on Rehearing (June 16, 2021), and the PUCO's

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

Second Finding and Order of December 18, 2019. OCC alleges that these Orders are unlawful and unreasonable in the following respects, all of which were raised in OCC's Applications for Rehearing:

1. The PUCO erred when it continued the terms of DP&L's "electric security plan," rather than continuing the utility's "standard service offer." The PUCO violated Ohio law (R.C. 4928.143(C)(2)) and unreasonably increased rates to consumers. (OCC Assignment of Error 1, Application for Rehearing (Jan. 17, 2020)).
2. Alternatively, the PUCO erred by issuing an Order which selectively implemented DP&L's earlier electric security plan that was unreasonable and unlawful because the PUCO chose to reinstate provisions that harm consumers and chose to exclude provisions (such as a distribution rate freeze) that benefit consumers. Additionally, the PUCO rulings on this issue are mistaken and misapprehend OCC's claim of error. (OCC Assignment of Error 2, Application for Rehearing (Jan. 17, 2020); OCC Assignment of Error 4, Application for Rehearing (July 16, 2021).
3. The PUCO erred by unreasonably and unlawfully approving DP&L's $76 million per year rate stabilization charge to consumers, allowing DP&L to collect tens of millions of dollars without record support for a service that DP&L is not providing consumers in violation of Ohio Supreme Court and PUCO precedent and Ohio law, including R.C. 4903.09, 4905.22 and 4928.02. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655; *In re: the Ohio Power Company*, Pub. Util. Comm. No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011). (OCC Assignment of Error 4, Application for

Rehearing (Jan. 17, 2020); OCC Assignment of Error 1, Application for Rehearing (July 16, 2021).

4. The PUCO erred in concluding that it does not have authority to make rates and charges paid by consumers and subsequently determined to be unlawful subject to refund unless two independent conditions are met. One of the conditions is that the tariff provisions is "reconcilable." When the PUCO added a reconcilable requirement for consumer refunds, the PUCO unreasonably and unlawfully construed Ohio law (R.C. 4905.32) (OCC Assignment of Error 2, Application for Rehearing (July 16, 2021).

OCC respectfully submits that the PUCO's August 11, 2021 Sixth Entry on Rehearing, its Fifth Entry on Rehearing, and its Second Opinion and Order are unreasonable and unlawful and should be reversed or modified with specific instructions to the PUCO to correct its errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 27th day of August 2021.

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CERTIFICATE OF FILING

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

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IN THE SUPREME COURT OF OHIO

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ATTACHMENTS TO THE NOTICE OF APPEAL
BY APPELLANT,
OFFICE OF THE OHIO CONSUMERS' COUNSEL

PUBLIC UTILITIES COMMISSION OF OHIO
ENTRIES/ORDERS

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

SIXTH ENTRY ON REHEARING

Entered in the Journal on August 11, 2021

I. SUMMARY

{¶ 1} In this Sixth Entry on Rehearing, the Commission denies the applications for rehearing filed by the Ohio Consumers' Counsel and The Dayton Power and Light Company.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company d/b/a AES Ohio (AES Ohio or the Company) 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 shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a

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

{¶ 4} 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 this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish AES Ohio'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 extended 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 AES Ohio'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 as directed by the Court and then granted AES Ohio's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). In light of AES Ohio's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted AES Ohio's application in this case 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, 2016), Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing AES Ohio'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. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *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.

{¶ 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 AES Ohio's distribution modernization rider, 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, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, AES Ohio filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). AES Ohio also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, 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 (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) filed a motion on December 4, 2019, seeking rejection of AES Ohio's proposed tariff filing.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved AES Ohio's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019). Subsequently, on January 17, 2020, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger.

{¶ 11} AES Ohio timely filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instanter to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing.

{¶ 13} Subsequently, the Commission issued the Fifth Entry on Rehearing in this case on June 16, 2021. OCC and AES Ohio each filed an application for rehearing on July 21, 2021. On July 30, 2021, OCC timely filed a memorandum contra the application for rehearing filed by AES Ohio. AES Ohio also timely filed a memorandum contra the application for rehearing filed by OCC on July 30, 2021.

III. DISCUSSION

A. OCC's First Assignment of Error and AES Ohio's Second Assignment of Error

{¶ 14} In its first assignment of error, OCC claims that the Commission erred when it approved a provider-of-last-resort (POLR) charge to consumers without finding it just and reasonable and without evidentiary support, and in violation of Supreme Court of Ohio and

Commission precedent and Ohio law, including R.C. 4903.09, 4905.22, and 4928.02(a). In support of this assignment of error, OCC contends that, between 2006 and 2024, consumers in AES Ohio's service territory will have paid $1.2 billion in POLR charges and stability charges. OCC further contends that the Commission failed to determine whether continuing to charge customers the RSC is reasonable and lawful. OCC alleges that the RSC is inconsistent with *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011) and the Commission's decision on remand, *In re the Ohio Power Company*, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011). OCC also claims that there is no evidentiary support to continue charging the RSC, in violation of R.C. 4903.09.

{¶ 15} In its memorandum contra OCC's application for rehearing, the Company contends that the Commission correctly ruled that R.C. 4928.143(C)(2)(b) required that the RSC be reinstated. The Company also claims that OCC waived the argument that additional evidence is needed because it failed to raise this issue in its January 17, 2020 application for rehearing. Further, AES Ohio avers that OCC ignores the plain language of the governing statute which expressly provides that, in the event of a withdrawal of an application for an ESP, the Commission "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer." R.C. 4928.143(C)(2)(b).

{¶ 16} The Company also argues the Commission correctly ruled in the Fifth Entry on Rehearing that OCC's arguments in support of this assignment of error are barred by R.C. 4903.10, res judicata and collateral estoppel. In addition, the Company claims that the Supreme Court upheld prior versions of the RSC in two cases. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39-40; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 17-26. AES Ohio also claims that it still provides POLR service; in addition to the reasons cited by the Commission in the Fifth Entry on Rehearing, AES Ohio claims that it bears POLR risk if there are an insufficient number of bidders at the SSO auctions or if the winning bidders default on their obligation to provide generation service to SSO customers. Finally,

AES Ohio argues that no further evidence is needed to justify the RSC because the Commission has provided ample justification for re-establishing the RSC, including the fact that the governing statute required the Commission to do so. Second Finding and Order at ¶ 26; Fifth Entry on Rehearing at ¶ 15.

{¶ 17} In its second assignment of error, AES Ohio claims that the Commission erred by failing to identify an additional reason that the RSC is lawful. Specifically, AES Ohio claims that the Commission erred by failing to find that, since the RSC was in effect as part of ESP I when ESP III was approved, the Commission was required to reinstitute the RSC as it existed when ESP III was terminated.

{¶ 18} In OCC's memorandum contra the Company's application for rehearing, OCC urges the Commission to reject AES Ohio's additional justification. OCC argues that the Commission was under no obligation to reinstate the RSC, which, OCC reasons, was part of ESP I but was not part of the previous SSO.

{¶ 19} The Commission finds that OCC's first assignment of error is improper as OCC seeks rehearing of a denial of rehearing on the same issue. The Commission has squarely addressed this question, consistently holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) (*Ormet*) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 20} In this case, OCC raised these same arguments in its fourth assignment of error in its application for rehearing filed on January 17, 2020. Fifth Entry on Rehearing at ¶ 23. The Commission denied rehearing on the fourth assignment of error. *Id.* at ¶ 30.

Accordingly, we find that OCC's first assignment of error in its June 16, 2021 application for rehearing is improper and should be denied.

{¶ 21} Moreover, even if OCC's first assignment of error was not improper, the Commission would deny rehearing on the assignment of error. OCC has raised no new arguments in support of this assignment of error, and the Commission thoroughly addressed these arguments in the Fifth Entry on Rehearing. Fifth Entry on Rehearing at ¶¶ 26-30. Accordingly, rehearing on this assignment of error should be denied.

{¶ 22} With respect to the Company's second assignment of error, AES Ohio argues that the Commission erred, in the Fifth Entry of Rehearing, by failing to find that "[s]ince the RSC was in effect as part of ESP I when ESP III was approved, the Commission was required to reinstitute the RSC as it existed when ESP III was terminated." We find that rehearing on this assignment of error should be denied. The Commission notes that, in the Second Finding and Order, in this case, issued on December 18, 2019, the Commission found that:

> 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.*
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> * * *
>
> [Ohio Hospital Association] 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.*

Second Finding and Order at ¶¶ 27, 31 (emphasis added).

The Commission's ruling in the Second Finding and Order is substantively identical to the language which AES Ohio claims the Commission erred by failing to adopt. Thus, having made the substantively identical ruling in the Second Finding and Order, we find that it was unnecessary for the Commission to repeat that finding in the Fifth Entry on Rehearing.

{¶ 23} We note, moreover, that OCC is barred from challenging this ruling now by R.C. 4903.10. As we stated in the Fifth Entry on Rehearing:

> Further, the Commission notes that, in the Second Finding and Order, we specifically ruled that: (1) the Commission had determined that the RSC is one of the provisions, terms, and conditions of ESP I in the December 19, 2012 Entry; (2) the December 19, 2012 Entry was a final, non-appealable order; and (3) any challenge to the December 19, 2012 Entry is untimely and barred by 4903.10. Second Finding and Order at ¶ 31. In its application for rehearing filed on January 17, 2020, OCC did not seek rehearing on this ruling contained in the Second Finding and Order. Therefore, OCC is barred from challenging this ruling, irrespective of the Commission's separate and independent

determination that OCC's claim is also barred by res judicata and collateral estoppel.

Fifth Entry on Rehearing at ¶ 37.

B. OCC's Second Assignment of Error and AES Ohio's First Assignment of Error

{¶ 24} OCC claims in its second assignment of error that the Commission erred in concluding that the Commission does not have discretion to make rates and charges subject to refund unless two independent conditions are met, where one of the conditions is that the tariff provision for the rate or charge is "reconcilable." OCC avers that, when the Commission added a reconcilable requirement for consumer refunds, the Commission unreasonably and unlawfully construed R.C. 4905.32.

{¶ 25} In its memorandum contra OCC's application for rehearing, AES Ohio argues that the Commission correctly ruled that it lacked authority to order the Company to collect the RSC subject to refund. The Company claims that OCC has waived this argument because it failed to cite to R.C. 4905.32 in its January 17, 2020 application for rehearing. The Company further argues that the Commission correctly concluded that it "has no statutory authority to make rates and charges subject to refund at [its] discretion," subject to exceptions that are inapplicable to the RSC. Fifth Entry on Rehearing at ¶¶ 52-60. AES Ohio avers that refunds are barred by long-standing precedent by the Supreme Court of Ohio. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, at ¶ 2. *See also, In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011- Ohio-1788, 947 N.E.2d 655 at ¶ 16 ("under *Keco*, we have consistently held that the law does not allow refunds in appeals from commission order"); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853 at ¶ 21 ("any refund order would be contrary to our precedent declining to engage in retroactive ratemaking").

{¶ 26} In AES Ohio's first assignment of error, the Company alleges that the Fifth Entry on Rehearing is unreasonable and unlawful because it requires AES Ohio to propose

language in its tariff making the RSC refundable "to the extent permitted by law." Fifth Entry on Rehearing at ¶ 64. The RSC cannot and should not be made refundable for two reasons: first, the RSC was not refundable under AES Ohio's most recent ESP, and R.C. 4928.143(C)(2)(b) requires the Commission to continue the terms of the Company's most recent ESP; and, second, requiring a utility to collect refundable rates is inconsistent with the balance created by the General Assembly.

{¶ 27} OCC responds, in its memorandum contra AES Ohio's application for rehearing, that the refund language should be included in AES Ohio's tariffs. OCC reasons that the language that the Commission directed be included in the tariffs is consistent with the balance struck by the General Assembly.

{¶ 28} The Commission finds that, with one exception, OCC has raised no new arguments in support of this assignment of error, and the Commission thoroughly addressed OCC's arguments in the Fifth Entry on Rehearing. Fifth Entry on Rehearing at ¶¶ 49-52. As noted in the Fifth Entry on Rehearing, the Commission remains bound to follow established precedent from the Supreme Court of Ohio. Fifth Entry on Rehearing at ¶ 52. The Court has consistently ruled that "[n]either the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco* * * *." *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774; see *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 16 (citing *Green Cove*, 2004-Ohio-4774); *see also In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462 at ¶ 49; *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764 at ¶ 28. The Commission notes that, in its sole new argument, OCC quotes Justice Kennedy's opinion in *In re Application of Dayton Power & Light Co. 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, at ¶ 26 (Kennedy, J., concurring). We find, however, that there is nothing inconsistent between Justice Kennedy's opinion and the Commission's directive that AES Ohio include, in the tariff, language that the RSC be refundable "to the extent permitted by

law." *Fifth Entry on Rehearing at ¶ 64. Therefore, rehearing on this assignment of error* should be denied.

{¶ 29} With respect to AES Ohio's first assignment of error, the Commission finds that rehearing on this assignment of error should be denied. The Commission explained the extraordinary circumstances surrounding this proceeding in the Fifth Entry on Rehearing:

> We agree with DP&L that, when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified and approved a subsequent application for an ESP and DP&L withdrew that application. However, the turn of events surrounding ESP I is nothing short of extraordinary. The Commission extended ESP I in the December 19, 2012 Entry while ESP II was pending before the Commission. After the Commission approved ESP II, the Supreme Court ruled that ESP II should be reversed, leading to the subsequent modification of ESP II by the Commission, DP&L's withdrawal of ESP II, and the first reinstatement of ESP I. After the Commission adopted ESP III, the Supreme Court dismissed as moot the appeals of the decision to reinstate ESP I. The Commission subsequently modified ESP III, based upon the Supreme Court's decision in the FirstEnergy ESP IV Case, leading to DP&L's withdrawal of ESP III and the second reinstatement of ESP I. We note that the continuing value of ESP I to ratepayers has been demonstrated in *In re The Dayton Power and Light Co.*, Case Nos. 18-1875-EL-GRD et al. (*Quadrennial Review Case*), which was decided contemporaneously with the decision in this proceeding. However, all of these events have contributed to the extraordinary circumstances surrounding ESP I.

Fifth Entry on Rehearing at ¶ 61.

We remain concerned that the absence of the tariff language making the RSC subject to refund "to the extent permitted by law" would preclude OCC from effectively pursuing an appeal in this case as the absence of such language may be sufficient to decide the appeal. We do not seek to evade review of our decisions by the Supreme Court of Ohio. Therefore, we affirm our determination that the extraordinary circumstances of this case require the inclusion of the tariff language as directed by the Commission in the Fifth Entry on Rehearing.

C. OCC's Third Assignment of Error

{¶ 30} In its third assignment of error, OCC alleges that the Commission erred in concluding that OCC is barred by res judicata and collateral estoppel from challenging AES Ohio's rate stability charge. When a judgment is issued without jurisdiction, it is void and subject to collateral attack. OCC contends that, because the Commission had no jurisdiction to order the continuation of AES Ohio's electric security plan, instead of its standard service offer, its order was void and is subject to collateral attack.

{¶ 31} AES Ohio, in its memorandum contra, claims that OCC already sought rehearing on this issue in its January 17, 2020 application for rehearing. AES Ohio also reiterates its argument that res judicata and collateral estoppel bar OCC from challenging the RSC. The Company avers that the Commission correctly concluded in the Fifth Entry on Rehearing that an ESP is a SSO. Fifth Entry on Rehearing at ¶¶ 15-16.

{¶ 32} Further, AES Ohio rejects OCC's claim that the Second Finding and Order is void. The Company notes that the Supreme Court of Ohio has recognized that if a tribunal "possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 19 (citation omitted); *see also Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, at ¶ 12 ("[o]nce a tribunal has jurisdiction over both the subject matter of an action and the parties to it * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but

the exercise of the jurisdiction thus conferred * * * ") (internal quotation marks and citation omitted). AES Ohio avers that there is no question that the Commission has subject-matter jurisdiction to issue orders that "continue the provisions, terms, and conditions of the utility's most recent standard service offer" when a utility terminates an ESP pursuant to R.C. 4928.143(C)(2). In fact, according to the Company, R.C. 4928.143(C)(2)(b) expressly requires "the commission," and no other body, to issue such orders.

{¶ 33} The Commission finds that OCC's third assignment of error is improper as OCC seeks rehearing of a denial of rehearing on the same issue. As noted above, in *Ormet,* the Commission held that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon the denial of rehearing of the same issue. *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (Sept. 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). *See also In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (Jan. 30, 2013) at 4-5.

{¶ 34} With respect to this assignment of error, OCC acknowledges that it raised these same arguments in its application for rehearing filed on January 17, 2020, stating "[a]s fully explained in OCC's prior application for rehearing (which was denied by the PUCO)." *See also* Fifth Entry on Rehearing at ¶¶ 13, 31-32. The Commission denied rehearing on the assignment of error. *Id.* at ¶¶ 15-16, 38-40. Accordingly, we find that OCC's third assignment of error in its June 16, 2021 application for rehearing is improper and should be denied.

{¶ 35} The Commission further finds that we would deny rehearing on the assignment of error even if the third assignment of error were not improper. As OCC appears to acknowledge, it has raised no new arguments in support of its third assignment of error. The Commission thoroughly addressed these arguments in the Fifth Entry on

Rehearing. Fifth Entry on Rehearing at ¶¶ 15-16, 38-40. Accordingly, rehearing on this assignment of error should be denied.

D. OCC's Fourth Assignment of Error

{¶ 36} In its fourth assignment of error, OCC alleges that the Commission erred in its findings excusing AES Ohio from its ESP I rate freeze commitment to customers. In violation of Supreme Court of Ohio precedent on this issue, the Commission's findings are mistaken and misapprehend OCC claims of error. OCC further argues that, consistent with R.C. 4903.09, and Supreme Court precedent, the Commission's findings can, and should, be abrogated.

{¶ 37} AES Ohio replies that OCC has already sought rehearing on this issue in its previous application for rehearing in this proceeding. The Company also argues that the Commission correctly ruled that OCC waived this argument in the Company's most recent distribution rate case. Fifth Entry on Rehearing at ¶ 19. AES Ohio also claims that that rate freeze was not part of the Company's most recent SSO and that any rate freeze was modified in AES Ohio's last distribution rate case.

{¶ 38} The Commission notes that, with respect to this assignment of error, OCC once again acknowledges that it seeks rehearing upon a denial of rehearing, stating that "OCC challenged the PUCO's unlawful and unreasonable ruling where it failed to continue, for the benefit of consumers, the distribution rate freeze that was part of DP&L's ESP I. * * * The PUCO, however, denied OCC's application for rehearing." Therefore, the Commission finds that OCC fourth assignment of error improperly seeks rehearing of a denial of rehearing on the same issue. *Ornet* at 3-4.

{¶ 39} The Commission notes that the improper filing of rehearing upon the denial of rehearing is particularly acute with respect to this assignment of error because OCC seeks to recast the assignment of error on which the Commission denied rehearing in the Fifth Entry on Rehearing. Arguing in the alternative, OCC first argues that it had no opportunity

to raise this issue in AES Ohio's prior rate case, *In re The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR (*2015 Distribution Rate Case*), because the Staff Report had not been filed during the time ESP I was in effect. However, OCC elides the fact that it could have sought a stay of the *2015 Distribution Rate Case* if it believed that the rate freeze was still in effect. We also note that, on August 5, 2021, OCC filed a motion to dismiss the application for an increase in rates in *In re the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Case Nos. 20-1651-EL-AIR et al. (*2020 Distribution Rate Case*). The Commission will determine in the *2020 Distribution Rate Case* whether a motion to dismiss is appropriate pursuant to R.C. 4909.18; however, we note that the filing of the motion to dismiss is effectively an admission that OCC had potential remedies in the *2015 Distribution Rate Case*, irrespective of whether the Staff Report had been filed during the time ESP I was in effect.

{¶ 40} OCC also claims that the Commission misapprehended the remedy sought by OCC in its application for rehearing filed on January 17, 2020. This claim is not persuasive. In the application for rehearing, OCC stated that:

> During the ESP I term, [AES Ohio] froze distribution rates, consistent with the PUCO-approved stipulation. But in 2018, three years after it filed to increase rates to customers, the PUCO unfroze the distribution rates, increasing distribution charges to [AES Ohio's] customers. Those increased distribution rates are now part of the continued rates approved by the PUCO in the [Second Finding and Order (Dec. 18, 2019)]. Not so for the ESP I distribution rate freeze, which the PUCO ignored. * * *
>
> The ESP I distribution rate freeze ended when the PUCO approved increased distribution rates for [AES Ohio] [citing *2015 Distribution Rate Case*, Opinion and Order (Sept. 26, 2018)].

Memorandum in Support of Application for Rehearing (Jan. 17, 2020) at 7, 9.

The argument in support of the application for rehearing clearly registers OCC's disagreement with the Commission's decision to continue the distribution rates lawfully set by the *2015 Distribution Rate Case*. Further, in the Fifth Entry on Rehearing, the Commission noted that OCC had not proposed any authority for the Commission to retroactively modify the distribution rates approved in *2015 Distribution Rate Case* as it is settled law in Ohio that retroactive ratemaking is not permitted. *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). Fifth Entry on Rehearing at ¶ 19. After the Commission ruled that OCC had not proposed any authority for the Commission to modify the rates set in the *2015 Distribution Rate Case*, OCC recast its January 17, 2020 application for rehearing, claiming that it did not seek to modify the rates approved by the Commission in the *2015 Distribution Rate Case*. Instead, OCC now argues that the remedy sought in the January 17, 2020 application for rehearing was for rates to be frozen at the levels set by the *2015 Distribution Rate Case* and for the dismissal of AES Ohio's pending rate case, *2020 Distribution Rate Case*. However, this argument is not persuasive. As noted above, the plain language of OCC's January 17, 2020 application for rehearing demonstrates that OCC was disputing the rates placed into effect in the *2015 Distribution Rate Case*, and OCC cannot have sought the dismissal of the *2020 Distribution Rate Case* in its January 17, 2020 application for rehearing because the *2020 Distribution Rate Case* was not filed until October 30, 2020, well after the filing of the January 17, 2020 application for rehearing.

E. OCC's Fifth Assignment of Error

{¶ 41} In its fifth assignment of error, OCC claims that the Commission erred by delaying its rehearing ruling until June 16, 2021 and by deferring yet more rehearing rulings beyond its June 16, 2021 Entry on Rehearing, in violation of R.C. 4903.10, R.C. 4903.11, 4903.12 and 4902.13, and is an abuse of discretion. OCC claims that the Commission's errors have wrongfully delayed the issuance of a final appealable order because the Commission is intending for there to be further rehearing rulings, all of which are denying OCC its statutory right of appeal and denying the Supreme Court its opportunity to review.

{¶ 42} In its memorandum contra, AES Ohio responds that the Commission correctly deferred ruling on the remaining applications for rehearing. The Company claims that, because the Fifth Entry on Rehearing addressed all assignments of error contained in OCC's application for rehearing, this assignment of error should be rejected as granting rehearing on this assignment of error would not abrogate or modify the Fifth Entry on Rehearing in any way. AES Ohio further argues that OCC's interest in the timing of the Commission's ruling on other parties' applications for rehearing extends only to its ability to file an appeal under R.C. 4903.10 through 4903.13. The Company avers that, since OCC itself sought rehearing from the Fifth Entry on Rehearing, any appeal is precluded at this time; thus, the Company concludes that OCC cannot complain about any inability to appeal while it remains standing in its own way.

{¶ 43} The Commission finds that rehearing on this assignment of error should be denied. OCC waived the arguments contained in this assignment of error by failing to file a motion for a stay or an application for rehearing of the Fourth Entry on Rehearing. The Commission further finds that OCC cannot demonstrate any prejudice by the Commission's decision to accept the request of the parties seeking rehearing to defer ruling on the remaining assignments of error.

{¶ 44} When the Commission issued the Fourth Entry on Rehearing in this proceeding, in which the Commission granted rehearing for the further consideration of the matters specified for rehearing, OCC had two opportunities to raise this issue with the Commission. First, OCC could have filed a motion for a stay in order to preserve this issue, but OCC has not sought a stay of any provision of the Second Finding and Order or the Fourth Entry on Rehearing. Moreover, because OCC failed to seek a stay of either the Second Finding and Order or the Fourth Entry on Rehearing, OCC cannot demonstrate prejudice resulting from these decisions. *ESP III Case,* Second Entry on Rehearing (Jan. 31, 2018) at ¶ 17. Next, OCC failed to file an application for rehearing, challenging the granting of rehearing for further consideration. OCC is aware of the need to file for rehearing to preserve its rights and has availed itself of this remedy in the past, *including in this very case.*

Application for Rehearing (Nov. 14, 2016) at 2, 4-7; Third Entry on Rehearing ¶¶ 36, 38. *See also, In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR, et al., Application for Rehearing (Jan. 20, 2017) at 5, Fourth Entry on Rehearing (Feb. 8, 2017) ¶¶ 19-20, 22; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Application for Rehearing (Jan. 6, 2017) at 2, 4-8, Seventh Entry on Rehearing (Feb. 1, 2017) at ¶¶ 10-13; *In re Dayton Power and Light Co.*, Case Nos. 12-426-EL-SSO et al., Application for Rehearing (Nov. 14, 2016) at 2-3, 4-7, Seventh Entry on Rehearing (Dec. 14, 2016) at ¶¶ 35, 37; *ESP III Case*, Application for Rehearing (Jan. 5, 2018) at 2, 4-7; Second Entry on Rehearing, (Jan. 31, 2018) at ¶¶ 11, 15-16. The Commission has generally denied rehearing on this argument by OCC but raising the issue on rehearing is still necessary to preserve the issue. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757 at ¶ 18. OCC did not seek rehearing of the Fourth Entry on Rehearing and, thus, waived the arguments raised in this assignment of error.

{¶ 45} The Commission further finds that OCC cannot demonstrate any prejudice by the Commission's decision to accept the request of the other parties seeking rehearing to defer ruling on the remaining assignments of error. As noted in the Fifth Entry on Rehearing, among other terms of a global stipulation filed on October 23, 2020, in *the Quadrennial Review Case*, the signatory parties, including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger requested that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represented that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn if the Commission issues a final appeal order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case*. Fifth Entry on Rehearing at ¶ 66. The Commission, in fact, adopted the global stipulation without modification on June 16, 2021. *Quadrennial Review Case*, Opinion and Order (Jun. 16, 2021); Fifth Entry on Rehearing ¶ 67. Accordingly, in the interests of administrative efficiency and in order to avoid the possible filing of unnecessary appeals by

parties who have no intention of prosecuting those appeals, the Commission deferred ruling on the applications for rehearing filed by IEU-Ohio and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger. Fifth Entry on Rehearing at ¶ 67.

{¶ 46} We find that OCC cannot demonstrate any prejudice by the Commission's decision to defer ruling on the applications for rehearing as requested by the parties. Initially, we are not persuaded that this ruling will necessarily result in a delay in the issuance of a final appealable order in this proceeding; it is not at all clear that a Commission order simply accepting the withdrawal of the applications for rehearing would constitute a final appealable order in lieu of a previously issued entry on rehearing.

{¶ 47} Moreover, in the Fifth Entry on Rehearing, the Commission directed AES Ohio to revise its tariff for the RSC to include language making the RSC refundable "to the extent permitted by law." AES Ohio filed compliance tariffs with the appropriate language on July 16, 2021. We are approving these tariffs below. If OCC files an appeal in this proceeding and is successful, refunds of the RSC should be made to the extent that such refunds are permitted by law, at least for any period the RSC is collected after this Sixth Entry of Rehearing. Therefore, the date on which the Commission accepts the withdrawal of applications for rehearing as provided by the *Quadrennial Review Case* will be irrelevant, and OCC can demonstrate no prejudice resulting from the decision to defer ruling on the applications for rehearing in the Fifth Entry on Rehearing.

F. AES Ohio's Proposed Tariffs

{¶ 48} In the Fifth Entry on Rehearing, the Commission directed the Company to file new proposed tariffs providing that the RSC shall be refundable "to the extent permitted by law." On July 16, 2021, AES Ohio filed proposed tariffs to comply with the Commission's directive. Upon review, the Commission finds that the proposed tariffs are consistent with the Fifth Entry on rehearing and do not appear to be unjust or unreasonable. In addition, the Commission finds that it is unnecessary to hold a hearing regarding the proposed tariffs. Accordingly, we find that the proposed tariffs should be approved.

IV. ORDER

{¶ 49} It is, therefore,

{¶ 50} ORDERED, That the applications for rehearing filed by OCC and AES Ohio be denied. It is, further,

{¶ 51} ORDERED, That the proposed tariffs filed by AES Ohio on July 16, 2021, be approved. It is, further,

{¶ 52} ORDERED, That AES Ohio be authorized to file, in final form, two complete copies of the tariffs, consistent with this Sixth Entry on Rehearing. AES Ohio shall file one copy in its TRF docket and one copy in this case docket. It is, further,

{¶ 53} ORDERED, That the effective date of the new tariffs shall be the date upon which the final tariffs are filed with the Commission. It is, further,

{¶ 54} ORDERED, That a copy of this Sixth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters

Recusal:
Lawrence K. Friedeman

GAP/hac

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Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Entry on Rehearing, the Commission denies the applications for rehearing filed by the Ohio Consumers' Counsel and The Dayton Power and Light Company. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio

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

FIFTH ENTRY ON REHEARING

Entered in the Journal on June 16, 2021

I. SUMMARY

{¶ 1} In this Fifth Entry on Rehearing, the Commission grants, in part, and denies, in part, the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) 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 this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I 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 extended 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 as directed by the Court and then granted DP&L's application to withdraw ESP II, thereby terminating it. *ESP II Case*, Finding and Order (Aug. 26, 2016). 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 this case 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, 2016), Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} 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. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *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.

{¶ 8} Subsequently, Interstate Gas Supply, Inc. (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, 2019-Ohio-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶¶ 1, 102-110, 134.

{¶ 9} 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 R.C. 4928.143(C)(2)(a). DP&L also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, 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 (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) (collectively, 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.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case*, Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved DP&L's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019). Subsequently, on January 17, 2020, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger.

{¶ 11} Thereafter, on January 22, 2020, DP&L filed a motion for an extension of time to file memorandum contra to the applications for rehearing filed by on January 17, 2020, and a request for expedited consideration. The motion for extension of time was granted by the attorney examiner, and DP&L filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instanter to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing. Fourth Entry on Rehearing (Feb. 14, 2020).

III. DISCUSSION

A. First Assignment of Error

{¶ 13} In its first assignment of error, OCC claims that the Commission erred when it continued the terms of DP&L's "electric security plan" rather than continuing the utility's "standard service offer". OCC further asserts that the Commission violated Ohio law and unreasonably increased rates to customers. OCC posits that the SSO means the costs of

energy generation to serve SSO customers, no more and no less. An ESP, by contrast, is much broader and can include all charges enumerated in R.C. 4928.143(B)(2). OCC claims that these enumerated charges are part of the ESP but not part of the SSO. Therefore, OCC argues that the Commission erred by including provisions authorized by R.C. 4928.143(B)(2) as provisions, terms and conditions of the most recent SSO.

{¶ 14} In its memorandum contra the application for rehearing, the Company disputes OCC's claim that the SSO means the costs of energy generation to serve SSO customers. DP&L argues that, as established by R.C. 4928.141, an SSO is either an ESP or an MRO. Thus, when 4928.143(C)(2)(b) provides that an EDU shall revert to its most recent SSO, it means that DP&L must revert to ESP I in its entirety and is not limited to the supply of generation.

{¶ 15} The Commission notes that R.C. 4928.141 requires each EDU to "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." R.C. 4928.142 states that an EDU "may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer." R.C. 4928.143 provides 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 * * *." Thus, we find that, under the plain language of the statute, an SSO may be a MRO or an ESP. Moreover, R.C. 4928.143(C)(2)(b) states, in relevant part:

> If the utility terminates an application pursuant to division (C)(2)(a) 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).

It is beyond dispute that, at the time DP&L withdrew from and terminated ESP III, ESP I was DP&L's most recent SSO, which was reinstated by the Commission on August 26, 2016, in these proceedings. Finding and Order (Aug. 26, 2016). Accordingly, the Commission restored the provisions, terms and conditions of ESP I, as required by the plain language of the statute.

{¶ 16} Moreover, we find that OCC's statutory interpretation to be flawed. OCC claims that the enumerated provisions in R.C. 4928.143(B)(2) can be part of the ESP but are not part of the SSO. However, several of the enumerated provisions include charges that relate solely to the SSO for non-shopping customers. R.C. 4928.143(B)(2)(e) specifically authorizes "[a]utomatic increases or decreases in any component *of the standard service offer price* * * * [emphasis added]." Under OCC's flawed interpretation of the statutes, this provision, which explicitly relates to the "standard service offer price," would be part of the ESP but not part of the SSO. Further R.C. 4928.143(B)(2)(a) authorizes:

> Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied *under the offer*; the cost of purchased power supplied *under the offer*, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes * * *. (emphasis added).

The General Assembly clearly intended that the SSO may include provisions allowing for the recovery of the cost of fuel, purchased power, emission allowances and carbon or energy

taxes. These provisions would be part of the ESP, but these provisions also would be one of the "terms, conditions or provisions" of the SSO applicable to non-shopping customers. OCC's statutory interpretation is not persuasive. Rehearing on this assignment of error should be denied.

B. Second Assignment of Error

{¶ 17} In its second assignment of error, OCC argues that the Second Finding and Order was unreasonable and unlawful and harmed consumers because it failed to continue the distribution rate freeze of ESP I following DP&L's withdrawal. OCC claims that DP&L's commitment to freeze distribution rates was a provision, term or condition of the utility's most recent ESP. OCC argues that under ESP I Stipulation, DP&L agreed to freeze rates but was able to seek charges from customers for storm damage costs it incurred. OCC further claims that the Commission's failure to implement a distribution rate freeze was unreasonable in light of the Commission's ruling in the Second Finding and Order allowing DP&L to separately collect storm costs in continued rates.

{¶ 18} DP&L argues that rehearing on this assignment of error should be rejected because OCC failed to raise this issue in response to the Commission's November 27, 2019 Entry establishing a comment period regarding DP&L's proposed tariffs to implement ESP I. *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"). In addition, the Company argues that the Commission effectively modified the distribution rate freeze provision contained in the ESP I Stipulation by adopting a stipulation filed in DP&L's most recent distribution rate case, *In re The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR (*Distribution Rate Case*), Opinion and Order (Sept. 26, 2018). The stipulation approved by the Commission in the *Distribution Rate Case* provides that the Company may file a distribution rate case on or before October 31, 2022, in order to maintain its distribution investment rider; thus, according to DP&L, the stipulation establishes that DP&L has the right to file a distribution rate case.

{¶ 19} The Commission finds that rehearing on this assignment of error should be denied. In the *Distribution Rate Case*, DP&L's current distribution rates were lawfully established by the Commission pursuant to the specific requirements of Chapter 4909 of the Revised Code. Although we are not persuaded that *Parma* should apply to OCC's failure to raise this issue during the comment period established by the November 27, 2019 Entry in this case, we do find that *Parma* applies to the failure of OCC to raise this issue during the *Distribution Rate Case*. While the *Distribution Rate Case* was pending before the Commission, the provisions, terms, and conditions of ESP I were reinstated for the period between September 1, 2016, and October 31, 2017; thus, OCC should have raised this issue, or otherwise preserved its rights, in the *Distribution Rate Case*, where the distribution rates were, in fact, established according to law. It is settled law in Ohio that retroactive ratemaking is not permitted. *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). However, OCC has offered no compelling argument regarding how the Commission, after approving distribution rates in the *Distribution Rate Case*, could retroactively modify DP&L's rates to the prior levels. Thus, we find that OCC's failure to raise this issue at an earlier juncture, during the *Distribution Rate Case*, constitutes a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, at ¶ 18 (citing *Parma*, 86 Ohio St.3d at 148, 712 N.E.2d 724).

C. Third Assignment of Error

{¶ 20} OCC alleges in its third assignment of error that charging customers for storm recovery expenses incurred in 2016, 2017 and 2018, following DP&L's withdrawal of its ESP, was unlawful. In support of this assignment of error, OCC claims that the Commission's ruling that DP&L's storm recovery expenses was a provision of DP&L's most recent SSO under 4928.143(C)(2)(b) was mistaken and unsupported in violation of R.C. 4903.09. OCC reasons that the storm recovery rider authorized in ESP I allowed DP&L to collect $23.3 million in costs from customers for storms occurring prior to and during the term of ESP I,

when a rate freeze was in effect. However, OCC notes that the tariff filed by DP&L to continue ESP I rates allows DP&L to collect 2017, 2018 and 2019 storm recovery costs from customers. OCC alleges that this rider was created in DP&L's ESP III case, not in ESP I. Thus, according to OCC, the storm recovery tariff is not a condition, term, or provision of the Company's most recent ESP and should not be used to continue collecting storm recovery costs from customers.

{¶ 21} DP&L responds that the ESP I Stipulation specifically authorized a storm recovery rider. ESP I Stipulation (Feb. 24, 2009) at 10-11. The Company notes that 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 recovery rider is permitted. The Company alleges that, in order to support its assignment of error, OCC reads the ESP I Stipulation to encompass a narrow recovery of storm costs incurred from 2008 through 2013, but the language of ESP I has no such time limitation, quite clearly permitting DP&L to recover "[t]he cost of storm damage." *Id.* at 11.

{¶ 22} The Commission finds that rehearing on this assignment of error should be denied. In the Second Finding and Order, the Commission noted that the ESP I Stipulation, adopted in these cases, contained a placeholder specifically permitting DP&L to seek approval of a rider to recover "the cost of storm damage." Second Finding and Order (Dec. 18, 2019) at ¶ 39; *see also* Opinion and Order (June 24, 2009) at 5-6, ESP I Stipulation at 10-11. There is no language in the ESP I Stipulation limiting the time period of storms eligible for recovery costs under the storm cost recovery rider. No party appealed the Commission's decision approving ESP I. DP&L subsequently sought, and obtained, Commission approval for a storm cost recovery rider. Therefore, we affirm that the storm cost recovery rider is a provision, term, or condition of ESP I and that eligible storm recovery costs were not limited to costs incurred during the period from 2008 through 2013. Moreover, we note that OCC's arguments lack consistency. OCC acknowledges that the storm recovery costs, which were appropriately collected, included costs "that were incurred, on or before the ESP I term." Storm recovery costs for 2016, 2017, and 2018 were, in fact, incurred prior to the

reinstatement of ESP I in the Second Finding and Order. Therefore, the Commission finds that DP&L should be permitted to continue its current storm cost recovery rider regardless of when the storm occurred.

D. Fourth Assignment of Error

{¶ 23} In its fourth assignment of error, OCC claims that the Commission unreasonably and unlawfully approved DP&L's RSC, allowing DP&L to collect funds from customers for a service that it is not providing. In support of this assignment of error, OCC notes that when the RSC was originally authorized, DP&L owned power plants that were providing power to customers. OCC acknowledges that the parties stipulated that the RSC would continue in ESP I at a rate equaling to 11 percent of DP&L's generation rate in 2004. However, OCC notes that, in DP&L's second ESP, the provider of last resort (POLR) obligations were shifted to bidders in competitive bid auctions to supply the SSO for DP&L's customers and that competitive auctions have been held to supply power through May 31, 2022. OCC argues that, when DP&L divested its power plants, DP&L stopped providing POLR service to customers. Thus, OCC concludes that the RSC should have been set to zero, consistent with the treatment of the environmental investment rider (EIR), when ESP I was reinstated.

{¶ 24} In its memorandum contra, DP&L responds that the Company still provides POLR service. DP&L notes that the Commission previously rejected this same argument when the Company withdrew from ESP II and ESP I was reinstated. Finding and Order (Aug. 26, 2016) at ¶ 23. The Company alleges that there is no guarantee that the competitive bidding auctions which supply SSO customers will continue or that any suppliers will bid; thus DP&L still bears a POLR risk that it will need to provide generation service to some or all of its customers if there are not enough bidders at auction. DP&L also posits that there is a risk that winning bidders will default on their obligation to provide generation service to SSO customers. Finally, DP&L claims that the right of shopping customers to return to the SSO imposes additional POLR risk for DP&L in the event that the SSO suppliers are unable to provide generation to returning customers.

{¶ 25} The Company also rebuts OCC claim that DP&L is no longer subject to POLR risk because it no longer owns generation assets. DP&L asserts that it has POLR risk because it has a statutory obligation to provide generation if there are no other providers, irrespective of whether it owns generation assets or not.

{¶ 26} As we discussed in the first Finding and Order in this proceeding, on December 28, 2005, the Commission modified and adopted a stipulation authorizing DP&L to split its previously approved rate stabilization surcharge into two separate components: the RSC[1] and the EIR. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR (*DP&L RSP Extension Case*), Opinion and Order (Dec. 28, 2005). The RSC was authorized to compensate DP&L for its POLR obligations, while the EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units. The Commission determined both the RSC and EIR were fair, reasonable, and supported by the record. *DP&L RSP Extension Case*, Opinion and Order at 11. Thereafter, the Supreme Court of Ohio affirmed our decision. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276.

{¶ 27} Subsequently, on June 24, 2009, in this case, the Commission approved a stipulation establishing ESP I and continuing the RSC and EIR as terms of ESP I. Opinion and Order (June 24, 2009). The amount of the RSC was stipulated by the parties in the ESP I Stipulation. Opinion and Order at 5; ESP I Stipulation at 4. As noted above. no party appealed the Commission's decision approving ESP I. Since that time, the Commission has consistently determined that the RSC is one of the provisions, terms and conditions of ESP I. When the Commission first extended ESP I on December 19, 2012, the Commission determined that the RSC was one of the provisions, terms and conditions of ESP I, and, as

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1 Although the ESP I Stipulation characterizes this charge as the "RSS" (or rate stabilization surcharge), the signatory parties clearly intended to mean the existing RSC approved by the Commission in *DP&L RSP Extension Case*, Case No. 05-276-EL-AIR. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E. 2d 269, ¶ 8, fn. 3.

such, the RSC should continue with ESP I until a subsequent SSO was 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. *See also* Finding and Order (Aug. 26, 2016) at ¶¶ 14, 19, 23; Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 25-34. As the Supreme Court of Ohio has ruled, we should respect our precedents in order to assure the predictability which is essential in administrative law. Second Finding and Order (Dec. 18, 2019) at ¶ 29 (*citing 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)).

{¶ 28} In addition, the Commission has noted that the RSC is a non-bypassable POLR charge to allow DP&L to fulfill its POLR obligations. 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. 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. 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. We note there have been substantial disruptions in the competitive bidding auction schedules due to litigation regarding capacity auctions at the Federal Energy Regulatory Commission (FERC). *In re Ohio Edison, et al.*, Case Nos. 16-776-EL-UNC et al, Second Entry on Rehearing (Feb. 24, 2021) at ¶¶ 4-5. These disruptions are the reason that competitive auctions have not been held to supply the SSO after May 31, 2022. The litigation at FERC appears to have been resolved, although that resolution could be affected by appeals to the Federal Court of Appeals. *Id.* at ¶ 22. Therefore, we cannot find that DP&L bears zero POLR risk.

{¶ 29} Although the POLR risk is difficult to quantify, the signatory parties, including OCC, did stipulate in the ESP I Stipulation to continue the RSC at the rate previously approved in the *DP&L RSP Extension Case*. The stipulated RSC was designed to collect 11 percent of DP&L's generation rates as of January 1, 2004, which at that time was $76,250,127. *DP&L RSP Extension Case*, Opinion and Order (Dec. 28, 2005) at 3, 11; *see also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 8, fn. 3. As we noted in the Third Entry on Rehearing in this proceeding:

> The Stipulation, which includes the RSC, was adopted by the Commission after holding a hearing and providing parties the opportunity to fully litigate this case. * * * The parties agreed that 1) the settlement was the product of serious bargaining among capable, knowledgeable parties; 2) the settlement, as a package, benefits ratepayers and the public interest; and 3) the settlement package does not violate any important regulatory principle or practice. Stipulation (Feb. 24, 2009) at 1-2. The Stipulation states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Stipulation (Feb. 24, 2009) at 17-18. Third Entry on Rehearing at ¶ 31.

We are reluctant to disturb the stipulated rates based upon the contention of one of the signatory parties, out of many, that circumstances have changed. The stipulated rates have never been subject to reconciliation or true up to recover a fixed revenue requirement. Further, the stipulated rates for the RSC have never been adjusted, irrespective of any changes in customer usage or to reflect changes in the market in DP&L's service territory; the rates for the RSC today are exactly the same as they were when the ESP I Stipulation was adopted in 2008. We are not persuaded that the stipulated rates should be changed now.

{¶ 30} Further, we reject OCC's contention that our treatment of the RSC is inconsistent with our treatment of the EIR when DP&L terminated its second ESP. The EIR was always a bypassable, cost-based rate, to allow DP&L to recover environmental plant investments and incremental operations and maintenance depreciation and tax expenses to install environmental control devices on its generating units. Once the plants were divested, the environmental controls were no longer used and useful in rendering public utility service to DP&L's non-shopping customers, and the Commission properly set the EIR to zero when DP&L returned to ESP I after the termination of its second ESP. Finding and Order, at ¶¶ 8-9, 22. On the other hand, the rates for the RSC, which is non-bypassable, were stipulated by the parties and were not based upon a specific cost incurred by the utility. Thus, there is no basis to set the RSC to zero. Accordingly rehearing on this assignment of error should be denied.

E. Fifth Assignment of Error

{¶ 31} OCC claims in its fifth assignment of error that the Commission unlawfully and unreasonably ruled that the parties were precluded from re-litigating the RSC under the doctrines of res judicata and collateral estoppel. In support of this assignment of error, OCC posits that the Commission's holding is unreasonable because the Commission can modify earlier orders so long as it explains the change and the new regulatory course is permissible. OCC claims that circumstances have changed because, since 2014, DP&L's POLR obligations have been eliminated because the POLR obligations were shifted to competitive generation providers until May 31, 2022, at the earliest.

{¶ 32} OCC also claims that the Commission ruling that the parties were precluded from relitigating the RSC under the doctrines of res judicata and collateral estoppel is unlawful because it is inconsistent with Supreme Court precedent. OCC argues that the Supreme Court of Ohio has held that res judicata in administrative proceedings should be rejected when its application would contravene and override public policy or result in manifest injustice. *Jacobs v. Teledyne*, 39 Ohio St.3d 168, 171, 529 N.E.2d 1255 (1988). OCC contends that it is not in the public interest to require customers to pay for a service they are

not receiving. Confusingly, OCC also claims that "shopping customers could be paying double for POLR service, once through the standard service offer rate paid to marketers and once through the Rate Stabilization Charge." OCC contends that the Court has held that changed circumstances that raise a new material issue or would have been relevant to resolve material issues in the earlier action will not bar ligation of the issue in the later action. In support of this claim, OCC notes that DP&L no longer owns generation and no longer provides the service that was the basis for the RSC.

{¶ 33} DP&L contends that the Commission correctly held in the Second Finding and Order that OCC is barred from relitigating the RSC by both R.C. 4903.10 and the doctrines of res judicata and collateral estoppel. DP&L notes that the Commission approved the ESP I Stipulation in this proceeding on June 24, 2009. Opinion and Order (Jun. 24, 2009) at 13. DP&L argues that, because R.C. 4928.143(C)(2)(b) was in place in 2009 when OCC signed the ESP I Stipulation, OCC was on notice that DP&L had the right to reinstate ESP I, in the event that the Commission modified and approved a subsequent ESP. DP&L further notes that 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. DP&L argues that a party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B).

{¶ 34} DP&L also contends that OCC is barred from challenging the lawfulness of the RSC by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. * * * Where a claim *could have been litigated in the previous suit*, claim preclusion also bars subsequent actions on that matter." (Emphasis added.) *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007) (quoting *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998); *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 384, 653 N.E.2d 226 (1995). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same

parties or their privies. * * * Issue preclusion applies even if the causes of action differ." O'Nesti at ¶ 7 (quoting *Fort Frye*, 81 Ohio St.3d at 395). "[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*, 73 Ohio St.3d at 382 (quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990)). Further, "the doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982). *See also* Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 32-33. DP&L asserts that, in this proceeding, OCC had the opportunity, in 2009, to litigate whether the RSC was lawful in ESP I. Instead, OCC signed the ESP I 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 I, including the RSC, if the Commission modified and approved DP&L's next ESP application. OCC is thus barred by res judicata and collateral estoppel from challenging the RSC now.

{¶ 35} We note that the fundamental issue in this assignment of error is whether OCC can relitigate the question of whether the RSC is one of the provisions, terms and conditions of ESP I. In the Second Finding and Order the Commission held that OCC cannot relitigate this issue on two separate and independent grounds. One, OCC is barred from relitigating the RSC by R.C. 4903.10. Two, OCC is barred from relitigating the RSC by res judicata and collateral estoppel. OCC has challenged the latter ruling but did not seek rehearing of the former.

1. OCC IS BARRED FROM RELITIGATING THE RSC BY R.C. 4903.10.

{¶ 36} As a preliminary matter, the Commission notes that, when the Commission first extended ESP I on December 19, 2012, 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, 2013, 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. This was a final appealable order of the Commission

because it authorized DP&L to continue to collect the RSC while the proposed ESP II was pending before the Commission; ultimately, the RSC was collected pursuant to the extension of ESP I for a full year, from January 1, 2013 to December 31, 2013. *See ESP II Case*, Entry (Dec. 13, 2013). No party, including OCC, appealed this ruling by the Commission. Thus, after the deadline for filing an appeal passed, the December 19, 2012 Entry was a final, non-appealable order of the Commission. The failure to appeal the December 19, 2012 Entry precludes any challenge to the ruling in the December 19, 2012 Entry at this time. *See also* Finding and Order at ¶ 23. Thus, OCC's claim, that it can relitigate the question of whether the RSC is one of the provisions, terms and conditions of ESP I is untimely and barred by R.C. 4903.10.

{¶ 37} Further, the Commission notes that, in the Second Finding and Order, we specifically ruled that: (1) the Commission had determined that the RSC is one of the provisions, terms, and conditions of ESP I in the December 19, 2012 Entry; (2) the December 19, 2012 Entry was a final, non-appealable order; and (3) any challenge to the December 19, 2012 Entry is untimely and barred by 4903.10. Second Finding and Order at ¶ 31. In its application for rehearing filed on January 17, 2020, OCC did not seek rehearing on this ruling contained in the Second Finding and Order. Therefore, OCC is barred from challenging this ruling, irrespective of the Commission's separate and independent determination that OCC's claim is also barred by res judicata and collateral estoppel.

2. OCC'S CLAIM IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

{¶ 38} 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*, 73 Ohio St.3d at, 382, 653 N.E.2d 226 ; . *see also O'Nesti*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803.

{¶ 39} In this case, the question of whether the RSC is one of the provisions, terms and conditions of ESP I was necessarily determined by the Commission in the December 19, 2012 Entry. The December 19, 2012 Entry addressed motions regarding this issue filed by both DP&L and by certain intervenors, including OCC. Memoranda contra and replies were filed addressing both motions. Thus, the administrative proceeding was judicial in nature and all parties had an opportunity to litigate the issue. Further, the parties had an opportunity to seek review of an adverse ruling. OCC and other intervenors filed applications for rehearing regarding the December 19, 2012 Entry. The Commission fully addressed those applications for rehearing in the first Entry on Rehearing in this case. Entry on Rehearing (Feb. 19, 2013) at 4-6. OCC had 60 days to file an appeal after the Commission issued the first Entry on Rehearing. R.C. 4903.11. OCC did not file an appeal. Thus, res judicata and collateral estoppel preclude OCC from relitigating the question of whether the RSC is a provision, term or condition of ESP I.

{¶ 40} We reject OCC's claims that the Commission's determination that res judicata and collateral estoppel preclude OCC from relitigating the RSC presents a manifest injustice or contravenes public policy. Likewise, we are not persuaded by OCC's argument that changed circumstances necessitate that res judicata and collateral estoppel should not apply. In support of these arguments, OCC cites to one fact, that DP&L has divested its generation assets. OCC presents this fact alone with no other context or supporting facts. As we stated above, DP&L retains a long-term POLR obligation under R.C. 4928.141, and we are not persuaded that the Company's POLR risk is zero. Moreover, the rate of the RSC is not cost-based but was stipulated by the parties to the ESP I Stipulation, including OCC. The stipulated rates for the RSC have never been adjusted or modified, irrespective of any

changes in customer usage or to reflect changes in the market in DP&L's service territory. OCC cites to no evidence that DP&L has been over-compensated or under-compensated for its POLR risk by the RSC. As stated above, we are reluctant to disturb a stipulated rate on the basis that one of the signatory parties now believes that changed circumstances dictate a new rate.

{¶ 41} OCC further alleges that the Commission's ruling in the Second Finding and Order is unreasonable because, although *the parties* were precluded from re-litigating the RSC by res judicata and collateral estoppel, *the Commission* can modify earlier orders so long as the Commission explains the change and the new regulatory course is permissible. We are not persuaded by OCC's claim. The Commission should respect our precedents in order to assure the predictability which is essential in administrative law. *Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 16 (*quoting Cleveland Elec. Illum. Co.*, 42 Ohio St.2d at 431, 330 N.E.2d 1). This does not mean, however, that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. However, the sole party seeking the Commission to change course at this point in the proceedings is OCC, and OCC is barred from re-litigating the RSC by res judicata and collateral estoppel. It would be disingenuous for the Commission, as requested by OCC, to modify our prior order to eliminate the RSC based upon arguments which we have found that OCC itself is barred from raising.

F. Sixth Assignment of Error

{¶ 42} In its sixth and final assignment of error, OCC claims that allowing DP&L's revised tariffs to be effective upon filing, before the Commission conducted a review and without making the tariffs subject to refund, was unreasonable and harmed customers.

{¶ 43} DP&L responds, initially, that the Commission is required to 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. Further, the Company claims that 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. Moreover, the Company argues that 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). Further, the Company contends that 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 while a case is pending before the Commission, while the no-refund rule prevents customers from recovering increased costs authorized by a Commission order. There is a rational balance between those two rules, with which the Commission should not interfere.

{¶ 44} For the reasons set forth below, rehearing on this assignment of error should be granted.

1. THE COMMISSION PROPERLY ADOPTED DP&L'S PROPOSED TARIFFS.

{¶ 45} As a preliminary matter, OCC's claim that the Commission erred by adopting the proposed tariffs without a prior review should be rejected. DP&L had withdrawn from ESP III and was returning to ESP I as directed by the statute. Time was of the essence. It is not unusual for the Commission, when time is of the essence, to order that revisions to proposed tariffs be filed as final tariffs, subject to final Commission review.

{¶ 46} In this case, DP&L filed proposed tariffs to return to ESP I. The Commission ordered modifications to those tariffs, including removal of certain riders. The Commission also directed DP&L to file revised tariffs in final form "subject to final review by the Commission." Second Finding and Order at ¶ 46. No further revisions to the tariffs were deemed necessary after the final tariffs were filed. No Staff recommendation was filed because none was necessary.

2. THE COMMISSION DOES NOT HAVE THE DISCRETION TO MAKE RATES AND CHARGES SUBJECT TO REFUND.

{¶ 47} In support of this assignment of error, OCC claims that the Commission has the authority to make rates subject to refund, noting previous cases where the Commission has made collections of a rate or charge subject to refund in order to explore the reasonableness of the rates in light of events that occurred after the issuance of the Commission order approving the rate. Thus, OCC argues that the Commission has the discretion to order rates collected from customers to be refundable.

{¶ 48} The Company responds that OCC's reliance on the previous cases is flawed. DP&L contends that, in one case, the utility consented to making the rates subject to refund. *In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry (May 18, 2016). In two other cases, the applicable law was changed *after* the Commission had decided the case.

{¶ 49} We note that, over 60 years ago, the Supreme Court of Ohio ruled that under Ohio's statute, 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." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* , 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). Subsequently, in 1982, the Court recognized an exception to *Keco* decision. *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982). In *River Gas*, the Court explained that the rate in *River Gas* did not involve the statutory ratemaking process involved in establishing fixed rate schedules but involved variable rate schedules for fuel cost adjustment, under which rates "varied without prior approval of the Commission, and independently from the formal rate-making process." Thus, the Court concluded that the rate in *River Gas* did not constitute "rate-making in its usual and customary sense." *Id.* The Court explained that *Keco* involved a situation where a consumer sued for restitution for amounts collected under a Commission-approved tariff later found to be unreasonable; whereas in *River Gas*, the Commission found that, in calculating costs that may be recovered

prospectively from customers, it was appropriate for certain refunds to be deducted from the costs. *River Gas* at 513-514.

{¶ 50} OCC does not identify any statutory authority vesting the Commission with the discretion to make rates and charges subject to refund. It is well established that the Commission is a creature of statute and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87,88, 706 N.E.2d 1255 (1999). Further, OCC does not cite to a single Supreme Court ruling that the Commission has discretion to make rates and charges subject to refund. In fact, OCC's sole mention of *Keco* is to cite to a separate opinion by Justice Pfeifer calling upon *the Supreme Court of Ohio* to overrule *Keco*. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶¶ 61-67 (Pfeifer, J., dissenting). The Commission is mindful of the potential unfairness when rates and charges are deemed unlawful but there is no refund of the rates and charges which have been collected from ratepayers. However, we are not the Supreme Court of Ohio, and we have no authority to overrule *Keco*. In fact, in the sole case cited by OCC, the Court affirmed that the only remedy to the no-refund rule in *Keco* is a stay under R.C. R.C. 4903.16. *Columbus S. Power*, 2014-Ohio-462 at ¶¶ 56-57 (*quoting Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17).

{¶ 51} Moreover, the cases cited by OCC, where the Commission ordered that certain rates be made subject to refund, are simply not analogous to this case. In each of these cases, the Commission directed that the rates and charges be collected subject to refund *after* the rate or charge had been declared unlawful and remanded to the Commission, or the underlying law which authorized the rate or charge had been modified or amended *after* the Commission had approved the rate or charge. For example, in *In re Ohio Power Co. and Columbus S. Power Co.*, the Supreme Court had reversed the Commission and remanded the case to the Commission for further proceedings. *In re Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry (May 18, 2016) at ¶ 6. After the remand, the Commission directed that future collections of the rate stability rider be collected subject to refund because the rate stability rider already had been ruled unlawful

by the Court. *Id.* at ¶¶ 1, 9, 11. Remand proceedings before the Commission can take time to resolve and that case was no exception; the case was ultimately resolved on February 23, 2017, when the Commission adopted a global stipulation which resolved the remand as well as several other cases. *In re Ohio Power Co. and Columbus S. Power Co.*, Order on Global Settlement Stipulation (Feb. 23, 2017). In the instant proceeding, on the other hand, the Supreme Court has not deemed the RSC unlawful nor has there been either a change in underlying law or a directive by the General Assembly to refund previously collected rates.

{¶ 52} We find that the Commission has no statutory authority to make rates and charges subject to refund at our discretion. The Court has consistently ruled that "[n]either the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco* * * *." *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829 at ¶ 27; see also *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶ 16 (citing *Green Cove*, 2004-Ohio-4774 at ¶ 27; *see also In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, *. N.E.3d 863 at ¶ 49; *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, 18 N.E.3d 1157 at ¶ 28. The Commission is bound to follow these decisions by the Supreme Court of Ohio.

{¶ 53} Nonetheless, as noted above, the Supreme Court has recognized an exception to *Keco*: refunds may be ordered if two independent conditions are both met. First, the tariff provision for the rate or charge must be reconcilable. In other words, the rate or charge must be subject to future adjustments which are implemented without prior Commission review and approval and be subject to true up and reconciliation. Thus, when the Commission established the rate or charge, the Commission must not have engaged in "rate-making in its usual and customary sense" in approving the rate or charge. *River Gas Co.*, at 513. The Court has explained that traditional ratemaking includes three steps: an application before the Commission, preapproval by the Commission, and the filing of the rate with the Commission prior to the collection of the rate. *River Gas* at 512-513. Moreover, reconcilable rates and charges (sometimes referred to as rate adjustment clauses) must be

authorized by statute. *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981).

{¶ 54} The second independent condition requires that the tariff contain language providing for refunds. If the tariff does not contain language providing for refunds, refunds cannot be ordered by the Commission. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1 (*FirstEnergy AER Case*) at ¶ 19; *see also FirstEnergy AER Case* at ¶¶ 66-67 (Kennedy, J., concurring) ("[b]ecause the tariff at issue here did not specify a refund, the commission's order of a refund of REC costs was unlawful retroactive ratemaking."). In the subsequent appeal regarding FirstEnergy's distribution modernization rider, the Court relied upon the lead opinion in the *FirstEnergy AER Case*, holding that R.C. 4905.32 bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism. *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 (*FirstEnergy ESP IV Case*) at ¶ 23 (citing *FirstEnergy AER Case* at ¶¶ 15-20). We note that, once the Court determined that FirstEnergy's tariffs for the distribution modernization rider did not include a provision for refunds, it was unnecessary for the Court to reach a decision whether the *River Gas* exception to *Keco* applied in the *FirstEnergy ESP IV Case*. The Court does not issue advisory rulings. *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982).

{¶ 55} OCC does not address this entire line of cases, but the Commission cannot simply ignore adverse precedent. There is nothing in the *FirstEnergy ESP IV Case* to support OCC's claim that the Commission has the discretion to make riders subject to refund or that *Keco* and its progeny can simply be ignored.

3. THE RATE STABILIZATION CHARGE DOES NOT MEET THE CONDITIONS SET FORTH IN RIVER GAS.

{¶ 56} While the Commission lacks the discretion to make the RSC subject to refund, *River Gas* does provide an exception to *Keco* if the rate or charge is subject to future adjustments which are implemented without prior Commission review and approval and

subject to true up and reconciliation. In other words, the Commission did not engage in "rate-making in its usual and customary sense" when the rate or charged was established. The Court has explained that traditional ratemaking includes three steps: (1) an application before the Commission, (2) preapproval by the Commission, and (3) the filing of the rate with the Commission prior to the collection of the rate. *River Gas* at 512-513. However, all three of the steps of traditional ratemaking are present with respect to the RSC.

{¶ 57} The RSC was requested pursuant to an application filed before the Commission in this docket on October 10, 2008. Application (Oct. 10, 2008). DP&L proposed that the SSO be the same as the rate stabilization plan approved by the Commission in *In re Dayton Power and Light Co.*, 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005), which was affirmed by the Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269. This rate stabilization plan, which was incorporated into the application, included the RSC. *See Ohio Consumers' Counsel*, 2007-Ohio-4276 at ¶ 8, fn 3.

{¶ 58} Moreover, the RSC was preapproved by the Commission. The Commission adopted the ESP I Stipulation submitted by the parties. Opinion and Order (June 24, 2009). The Commission specifically noted that the RSC would continue in the Opinion and Order and approved the proposed tariffs filed on February 24, 2009. *Id.* at 5, 11.

{¶ 59} Finally, the rate of the RSC was filed with the Commission prior to the collection of the rate. As noted above, in the Opinion and Order, the Commission approved the proposed tariffs, including the RSC, which were filed on February 24, 2009. *Id.* Subsequently, revised tariffs were filed on June 29, 2009, with an effective date of June 30, 2009. These revised tariffs included the rates for the RSC. Tariff Filing (Jun. 29, 2009). These rates for the RSC have remained unchanged each time ESP I has been reinstated. Tariff Filing (Sep. 1, 2016); Tariff Filing (Dec. 19, 2019).

{¶ 60} The Commission finds that, as all three steps of traditional rate-making set forth in *River Gas* have been met with respect to the RSC, the Commission engaged in rate-

making in its usual and customary sense in establishing the RSC. Accordingly, we find that the *River Gas* exception to *Keco* does not apply with respect to the RSC, and the RSC should not be refundable.

4. THE RATE STABILIZATION CHARGE SHOULD BE MADE REFUNDABLE TO THE EXTENT PERMITTED BY LAW.

{¶ 61} As stated above, the Commission is mindful of the potential unfairness when rates and charges are deemed unlawful, but there is no refund of the rates and charges which have been collected from ratepayers. We also note the extraordinary circumstances that the procedural history of this case presents. We agree with DP&L that, when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified and approved a subsequent application for an ESP and DP&L withdrew that application. However, the turn of events surrounding ESP I is nothing short of extraordinary. The Commission extended ESP I in the December 19, 2012 Entry while ESP II was pending before the Commission. After the Commission approved ESP II, the Supreme Court ruled that ESP II should be reversed, leading to the subsequent modification of ESP II by the Commission, DP&L's withdrawal of ESP II, and the first reinstatement of ESP I. After the Commission adopted ESP III, the Supreme Court dismissed as moot the appeals of the decision to reinstate ESP I. The Commission subsequently modified ESP III, based upon the Supreme Court's decision in the *FirstEnergy ESP IV Case*, leading to DP&L's withdrawal of ESP III and the second reinstatement of ESP I. We note that the continuing value of ESP I to ratepayers has been demonstrated in *In re The Dayton Power and Light Co.*, Case Nos. 18-1875-EL-RDR et al. (*Quadrennial Review Case*), which was decided contemporaneously with the decision in this proceeding. However, all of these events have contributed to the extraordinary circumstances surrounding ESP I.

{¶ 62} We note in particular the Supreme Court's decision to dismiss the appeals of our decision to reinstate the provisions of ESP I in the August 26, 2016 Finding and Order. *Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507. The Court

had no reason to believe that this question, whether the RSC is one of the provisions, terms and conditions of ESP I, would be raised again as the Commission had approved a third ESP for DP&L; but events have demonstrated that, although OCC's appeal of the decision to reinstate ESP I was moot, the question is capable of repetition yet evading review.

{¶ 63} OCC believes that we have the discretion to make the RSC refundable. As set forth in detail above, we disagree. OCC's claim has no basis in law. We also have determined above that the RSC is not a reconcilable rider pursuant to *River Gas* which may be subject to refund under the established exception to *Keco*. However, if we do not direct the Company to include a provision for refunds in the tariffs for the RSC, OCC may not be able to effectively appeal our rulings that we lack the discretion to make the RSC refundable and that the RSC is not subject to the *River Gas* exception to *Keco*. The absence of language providing for refunds may be sufficient to decide the appeal. The Court would have no need to reach the question of whether the Commission has the discretion to make the RSC refundable or whether the RSC is subject to *River Gas*. As noted above, the Court does not issue advisory rulings. *Armco,* 69 Ohio St.2d at 406.

{¶ 64} We do not seek to evade Supreme Court review of our decisions. Therefore, in light of the extraordinary circumstances in this case, the Commission will grant rehearing on OCC's sixth assignment or error. In fashioning tariff language, we are mindful of our rulings in this case. Therefore, we will direct the Company to file new proposed tariffs providing that the RSC shall be refundable "to the extent permitted by law." This language should allow OCC to effectively appeal our decisions in this case without undermining our rulings. We note that our decision is limited to the extraordinary circumstances of this case, including the fact that previous appeals of a decision to reinstate the RSC were dismissed as moot.

G. Remaining Applications for Rehearing

{¶ 65} Contemporaneous with the issuance of this Fifth Entry on Rehearing, the Commission issued the Opinion and Order in *the Quadrennial Review Case*. In the Opinion

and Order in the *Quadrennial Review Case,* the Commission adopted a global stipulation resolving the quadrennial review of ESP I mandated by R.C. 4928.143, as well as DP&L's grid modernization proposal, and DP&L's significantly excessive earnings test cases for 2018 and 2019.

{¶ 66} Among other terms of the global stipulation filed on October 23, 2020, the signatory parties, including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger requested that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represent that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn if the Commission issues a final appeal order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case.*

{¶ 67} The Opinion and Order in the *Quadrennial Review Case* adopted, without modification, the global stipulation filed in that proceeding. Accordingly, to the extent necessary, the Commission will address the applications for rehearing filed by IEU-Ohio and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger by subsequent entry.

IV. ORDER

{¶ 68} It is, therefore,

{¶ 69} ORDERED, That the applications for rehearing filed by OCC be granted, in part, and denied, in part. It is, further,

{¶ 70} ORDERED, That a copy of this Fifth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Lawrence K. Friedeman

GAP/hac

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in

Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Entry on Rehearing granting, in part, and denying, in part, the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Ms. Mary E Fischer on behalf of Public Utilities Commission of Ohio

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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Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Finding & Order 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. electronically filed by Docketing Staff on behalf of Docketing.