

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer.))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.))	Case No. 12-672-EL-RDR

**REPLY OF JOINT MOVANTS TO MEMORANDUM CONTRA OF THE DAYTON
POWER AND LIGHT COMPANY TO MOTION FOR A STAY
OR, IN THE ALTERNATIVE,
MOTION TO MAKE DP&L'S RATES FOR CHARGING THE SERVICE
STABILITY RIDER COSTS TO CUSTOMERS SUBJECT TO REFUND**

Samuel C. Randazzo
(Counsel of Record)
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

Maureen R. Grady, Counsel of Record
Edmund "Tad" Berger
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-9567 - Grady
Telephone: (614) 466-1292 – Berger
Maureen.grady@occ.ohio.gov
Edmund.berger@occ.ohio.gov

**ATTORNEYS FOR THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Ph: (513) 421-2255
Fax: (513) 421-2764
Dboehm@BKLawfirm.com
Mkurtz@BKLawfirm.com
Jkylercohn@BKLawfirm.com

ATTORNEYS FOR OHIO ENERGY GROUP

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
Telephone: (419) 425-8860
cmooney@ohiopartners.org

**ATTORNEY FOR OHIO PARTNERS FOR
AFFORDABLE ENERGY**

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I. INTRODUCTION

On July 30, 2014, Industrial Energy Users-Ohio ("IEU-Ohio"), the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Energy Group ("OEG"), and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Movants") filed a motion seeking a stay ("Motion to Stay") of the order of the Public Utilities Commission of Ohio ("Commission") authorizing the Dayton Power and Light Company ("DP&L") to bill and

collect a nonbypassable charge, the Service Stability Rider (“SSR”). In the alternative, Joint Movants requested that the Commission order that the amounts be collected by DP&L subject to refund. The Joint Movants seek the requested relief to protect customers from paying rates that are unjust, unreasonable, and unlawful.

As the Joint Movants demonstrated, the Commission should grant the stay because the Joint Movants are likely to prevail in their challenge of the authorization of the order, failure to grant relief will irreparably harm customers, the requested relief will not injure DP&L or can be fashioned in such a way as to prevent injury to DP&L, and the public interest supports the grant of relief.¹

On August 14, 2014, DP&L filed a memorandum opposing the Motion to Stay.² In its Memorandum Contra, DP&L asserts that the Commission should permit DP&L to continue to collect the unlawful SSR charges because the Commission rejected a request for stay in an unrelated case,³ that the Commission lacks authority to issue a stay,⁴ and that the requested relief is improper because DP&L will suffer if it does not

¹ Motion to Stay at 3-8.

² The Dayton Power and Light Company’s Memorandum in Opposition to the Joint Motion for Stay to Prevent DP&L from Charging Customers the Service Stability Rider While Appeals Are Pending or, in the Alternative, Motion to Make DP&Ls Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund Pending the Outcome of the Rehearing and any Appeals by Industrial Energy Users-Ohio, Office of the Ohio Consumers’ Counsel, Ohio Energy Group and Ohio Partners for Affordable Energy (Aug. 14, 2014) (“Memorandum Contra”)

³ Memorandum Contra at 4-5.

⁴ *Id.* at 5-7.

extract additional above-market revenue from customers for its generation-related resources.⁵

Because DP&L's arguments are without merit, the Commission should grant the Motion to Stay or in the alternative order that the SSR be collected subject to refund. Doing so would protect customers from the irreparable harm that comes from the fact that rates once collected will not likely be refunded, even if the rates are later found to be unlawful or unreasonable.

II. **ARGUMENT**

A. The Commission's rejection of a request to collect rates subject to refund earlier this year in an unrelated case should not preclude the Commission from ordering rates to be collected subject to refund in this proceeding to protect customers

Initially, DP&L argues that the Commission should deny the Motion to Stay because earlier this year it rejected a request by OCC and others to collect rates subject to refund in the Duke Energy Ohio, Inc. ("Duke) Gas Rate case, Case No. 12-1685-GA-AIR. In that case, the Commission ruled against a motion requesting an order directing Duke to collect manufactured gas plant-related charges ("MGP") through Rider MGP subject to refund.⁶ DP&L's reliance on this case as a basis for the Commission to deny the Motion to Stay is unwarranted because the Supreme Court of Ohio ("Court") subsequently ordered that collection of Rider MGP be stayed, initially without ordering

⁵ *Id.* at 7-12.

⁶ Memorandum Contra at 5, citing *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case Nos. 12-1685-GA-AIR, *et al.*, Entry at ¶9 (Feb. 19, 2014).

the posting of a bond.⁷ If the cases are “remarkably similar,” as DP&L alleges,⁸ the Commission should follow the precedent on the merits of the request for a stay provided by the Court and grant the stay to protect consumers while this matter proceeds through the appeals process.

Further, the merits of the Motion to Stay demonstrate that the Commission should grant the stay. As discussed in the Motion to Stay and additionally below, the Joint Movants have demonstrated grounds for an order staying the authorization of the SSR or its collection subject to refund. If the Commission does not grant the motion, customers will once again suffer the “unfair” outcome resulting from this Commission’s application of the Court-fashioned no refund rule.⁹ As Justice recently noted, parties must seek to stay an order on “the front end in order to prevent unreasonable fees from being collected. Otherwise customers cannot achieve a real remedy.”¹⁰ If the Commission again refuses to grant a stay or order the SSR to be billed and collected subject to refund, customers will once again be without a real remedy unless the Court once again is asked to intervene and grants a stay.

Further, the Commission should grant the motion that the SSR be collected subject to refund because it has represented to the Court that a rider such as the SSR is subject to annual reconciliation. As the Commission stated on August 15, 2014 in a

⁷ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, S. Ct. Case No. 2014-0328, Entry (May 14, 2014).

⁸ Memorandum Contra at 1.

⁹ *In re Columbus Southern Power Co.*, 138 Ohio St. 3d 448, 462 (2014).

¹⁰ *In the Matter of the Application of Duke Energy Ohio Inc., for an Increase in its Natural Gas Distribution Rates*, S. Ct. Case No. 2014-0328, Entry (July 29, 2014) (Pfeiffer, J., dissenting).

brief filed in the Duke MGP Appeal, a rider, as opposed to charges collected under base distribution rates, is subject to reconciliation, and accordingly the Court-fashioned no-refund rule does not apply.¹¹ Because the no-refund rule does not apply, revenue collected under the rider is subject to reconciliation for any amounts unlawfully charged customers.¹² Because a charge such as the SSR is subject to reconciliation, DP&L cannot suffer any injury if the Commission orders that the SSR revenue be collected subject to refund: amounts unlawfully collected must be ordered returned to customers through a reconciliation process. (In the alternative, the Joint Movants are requesting the stay if the Commission correctly concludes that a stay better protects customers from billing and collection of the unlawful and unreasonable rider while this matter is being reviewed.)

As outlined in the Motion to Stay, a just process is available if the authorization of the SSR is stayed or if rates are collected subject to refund. As discussed below, the Commission has repeatedly issued stays of its procedural and rate setting orders to maintain the status quo. Likewise, the Commission has ordered the billing and collection subject to refund as in its recent case regarding the unlawful provider of last resort charge during the remand phase of Ohio Power Company's ("AEP-Ohio") electric security plan ("ESP") proceeding, Case No. 08-917-EL-SSO. It did so after finding that collecting the rates subject to refund, pending the outcome of the remand proceeding,

¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, S. Ct. 14-0328, Brief Regarding Bond Requirements Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio at 3 & 8 (Aug. 15, 2014).

¹² *In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, Case No. 09-872-EL-FAC, *et al.*, Opinion and Order at 13-14 (Jan. 23, 2012).

was “the most reasonable means to facilitate a just process for AEP-Ohio customers and the Companies and avoid rate volatility for some customers.”¹³

Based on applicable Commission and Court precedent, therefore, the Commission should issue an order staying the authorization of the SSR or ordering that the SSR be collected subject to refund pending the outcome of an appeal(s) at the Court because either is a reasonable means to facilitate a just process for both DP&L and its customers.

B. The Commission has authority to issue stays of its orders; it should do so here to protect customers from paying rates that are unjust and unreasonable

DP&L further claims that the Commission has no authority to issue stays of its final orders. In support of this claim, DP&L incorrectly cites one Ohio Supreme Court case and advances a statutory argument that the Commission will unlawfully invade the jurisdiction of the Court if it grants the motion for a stay.¹⁴ Its argument that the Commission lacks authority ignores long-standing Commission practice. Further, the “authority” it relies upon is *obiter dictum* and does not support its contention that the Commission lacks authority to issue a stay. Finally, DP&L’s assertion that a stay will invade the Court’s jurisdiction is factually and legally incorrect.

¹³ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Entry at ¶10 (May 25, 2011). The Commission has ordered rates collected subject to refund in other cases as well. See, e.g., *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Entry (Nov. 17, 1982); *In the Matter of the Commission’s Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

¹⁴ Memorandum Contra at 5-7.

The Commission has consistently found that it has the authority to issue stays of its orders.¹⁵ (DP&L itself has not objected to a request for a stay of proceedings while the parties reduced an agreement to writing.¹⁶) The orders stayed by the Commission include the substantive outcomes of its orders while review of the Commission's order is pending. For example, the Commission stayed an order that Ohio Power Company refund amounts to customers by way of a reconciliation adjustment while the utility's application for rehearing was pending.¹⁷ Likewise, the Commission has stayed execution of its orders to cease and desist violations of transportation regulations.¹⁸ More recently, the Commission has issued a stay of its order concerning the terms of an interconnection agreement between Verizon and United Telephone Company of Ohio while it considered an application for rehearing.¹⁹ Based on this long history of Commission orders granting stays, DP&L's assertion that the Commission lacks authority to stay its orders is meritless.

The lack of merit is borne out by the authority it cites to claim that the Commission is without authority to issue a stay. To support its argument that the

¹⁵ See, e.g., *In the Matter of the Complaint of Arthur C. Risley v. CSX Transp., Inc.*, 2010 WL 148957 (Ohio Pub. Util. Comm'n of Ohio Jan. 1, 2010) (staying proceedings on complaint alleging improper actions by CSX).

¹⁶ *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 91-415-GA-AIR, Entry (Dec. 30, 1991).

¹⁷ *In the Matter of the Regulation of the Fuel Adjustment Clause Contained Within the Rate Schedules of the Ohio Power Company and Related Matters*, Case No. 77-380-EL-FAC, Entry (Aug. 30, 1978).

¹⁸ *In the Matter of the Citation by the Public Utilities Commission of Ohio of Von Kaenel Trucking*, Case No. 72-364-M, Entry (May 1, 1975).

¹⁹ *In the Matter of the Petition of MCImetro Access Transmission Services LLC dba Verizon Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq*, Case No. 06-1485-TP-ARB, Entry (Aug. 24, 2007).

Commission lacks authority to issue a stay, DP&L quotes at length from the Court's decision in *Office of Consumers' Counsel v. Public Utilities Commission of Ohio* ("*Consumers' Counsel*").²⁰ The *Consumers' Counsel* decision resolved two cases addressing tariffs of Ohio Edison.²¹ In a complaint case, the Commission ruled adversely to OCC; in the related tariff case, the Commission denied a motion to stay modifications of the tariff authorized by the order in the complaint case. OCC appealed both cases, and they were consolidated for oral argument.²² The Court affirmed the Commission's findings concerning the tariff on the merits.²³ It then addressed the separate appeal of the stay. Having found against OCC on the substantive issue presented by the consolidated appeals, the Court stated that "the procedural issue [concerning the stay] presented within ... is moot."²⁴ The Court nonetheless discussed the Commission's authority to grant the relief that OCC sought, the statement that DP&L quotes.²⁵ Simply put, the portion of the *Consumers' Counsel* decision on which DP&L relies addresses matters the Court did not decide; the language is *obiter dictum*.

The *dicta*, moreover, are inapplicable to the current case. In *Consumers' Counsel*, the Court stated that R.C. 4903.16 was applicable to a final Commission order

²⁰ Memorandum Contra at 6.

²¹ Commission records indicate that the two related cases were Case No. 89-1031-EL-CSS and Case No. 90-718-EL-ATA.

²² *Office of Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 61 Ohio St.3d 396 (1991).

²³ *Id.* at 402.

²⁴ *Id.* at 403.

²⁵ Memorandum Contra at 6.

during the pendency of an appeal.²⁶ If this statement is more than *dicta*, then, it requires that two conditions must be satisfied before the Commission loses its authority to issue a stay: first, the Commission's order must be final; second, there must be an appeal. Neither condition applies at this stage of the proceedings.

As to the first condition, the Commission's order is not yet final such that an unrestricted right to appeal currently exists. If a party were to seek rehearing during the thirty-day period provided by R.C. 4903.10, the right to proceed with an appeal would be suspended until the Commission addressed the subsequent application for rehearing and an additional thirty days ran without a party filing another application for rehearing.²⁷ The Commission's Fifth Entry on Rehearing was issued on July 23, 2014. The thirty-day clock of entry on rehearing will not run until August 26, 2014. Accordingly, the Fifth Entry on Rehearing could still be the subject of an application for rehearing. As a result, no party is assured of successfully filing a notice of appeal to the Fifth Entry on Rehearing until August 26, 2014. For all practical purposes, the order will not be final until the thirty-day period has run.

As to the second requirement that there be a pending appeal, no party has filed a notice of appeal initiating a proceeding before the Court. As to a final order of the Commission, the proceeding to obtain a reversal, vacation, or modification is initiated by a notice of appeal.²⁸ When a notice of appeal is filed to initiate a proceeding to reverse,

²⁶ *Consumers' Counsel*, 61 Ohio St.3d at 402-03.

²⁷ *Senior Citizens Coalition v. Pub. Util. Comm'n of Ohio*, 40 Ohio St.3d 329 (1988).

²⁸ R.C. 4903.11 & 4903.13.

vacate, or modify a final order rendered by the Commission, the Court may then issue a stay.²⁹ Because no party has filed a notice of appeal, the second “condition,” a pending appeal, is not satisfied.

Additionally, DP&L argues that the requested relief would be inconsistent with the requirements established by the General Assembly governing the Court and thus invade the Court’s jurisdiction.³⁰ Yet, there is nothing inconsistent with a Commission determination that its order should be stayed to protect the well-being of customers while the matter remains before it. In fact, the Commission has endorsed the four-factor test outlined in the motion as the proper considerations for it to review when a party seeks a stay.³¹ Moreover, seeking a stay at the Commission will not “upend the statutory framework”³² provided for matters on appeal to the Court. Once the Commission’s orders are final and a notice of appeal is properly before the Court, it will decide if a stay should be granted if the Commission does not act and the Court is presented with a proper motion under R.C. 4903.16.

²⁹ This argument addresses the limitations on the Court’s authority to issue a stay provided by the General Assembly. The parties have argued elsewhere that the Court has authority inherent in its judicial powers to issue a stay without the bonding requirement. Under well-understood constitutional law concerning separation of powers, the General Assembly may not encroach on the Court’s judicial authority to issue a stay in appropriate circumstances. *City of Norwood v. Horney*, 110 Ohio St.3d 353 (2006).

³⁰ Memorandum Contra at 6.

³¹ *In the Matter of the Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS, Entry at 2 (July 8, 2009); *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003).

³² Memorandum Contra at 6.

In summary, DP&L's argument that the Commission lacks authority to issue a stay is nonsense. The argument ignores years of Commission precedent and is premised on *dicta*. Even the *dicta* are not applicable to the facts presented by this Motion. Additionally, a stay would not invade the authority of the Court. Accordingly, the Commission should reject DP&L's claim that the Commission lacks authority to order a stay.

C. The Joint Movants have stated grounds on which the Commission should grant a stay that will protect customers

In their motion, the Joint Movants have demonstrated that there is a strong likelihood that they will prevail in their appeal of the Commission's order authorizing the SSR,³³ that the customers of DP&L will be irreparably harmed if the Commission does not grant the stay,³⁴ that DP&L will not be harmed by a stay of the Commission's unlawful order or that DP&L's interests can be adequately protected,³⁵ and that considerations of where the public interest lies justify a stay of the authorization of the SSR.³⁶ In response, DP&L states that the Commission should not grant the stay for two reasons. First, it asserts that the Commission should uphold its order. Second, it claims that it would be irreparably harmed and that customers will suffer from reduced services. Neither claim has merit.

³³ Motion for Stay at 3-4.

³⁴ *Id.* at 5-6.

³⁵ *Id.* at 6.

³⁶ *Id.* at 7.

Initially, DP&L argues that the Commission should deny the Motion to Stay because the Commission has previously rejected challenges to the SSR.³⁷ The fact that the Commission has already ruled against the Joint Movants, however, cannot be controlling. In each instance in which a party seeks a stay from the Commission, the Commission initially has ruled in a way that is or has become adverse to the moving party. The moving party then seeks to suspend the implementation of the order because of either intervening circumstances or the adverse consequences that enforcement would cause, particularly when it is apparent that the initial ruling was unlawful.³⁸ Under the standard DP&L would have the Commission apply, no motion to stay would ever be successful since the Commission has already issued an order that is adverse to the moving party. DP&L's claim that the Commission's prior decision should control the outcome of the Motion to Stay, thus, would lead to an absurd result, and should be rejected.

DP&L also asserts that the Joint Movants have ignored the Commission's reliance on R.C. 4928.143(B)(2)(d) to authorize the SSR. DP&L's argument, however, assumes that R.C. 4928.143(B)(2)(d) can authorize a rider that another section of Chapter 4928 prohibits. In particular, R.C. 4928.02(H) prohibits anticompetitive subsidies and the recovery of generation-related costs through distribution or transmission rates. In the *Sporn* case, the Commission held that it could not authorize a rider to recover closure costs of a generation facility because it would violate the

³⁷ Memorandum Contra at 7-8.

³⁸ See cases cited above.

prohibition of generation-related subsidies in R.C. 4928.02(H).³⁹ Regardless of the scope of R.C. 4928.143(B)(2)(d) (which the Joint Movants in their prior briefs demonstrate does not authorize the SSR), the Commission cannot authorize a rider that violates R.C. 4928.02(H).⁴⁰

DP&L's reliance on R.C. 4928.143(B)(2)(d) also assumes that the Commission may authorize the collection of transition revenue under that section and thereby ignore the prohibition of the authorization of transition revenue or its equivalent. R.C. 4928.38, however, provides that the Commission "shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in section 4928.31 to 4928.40 of the Revised Code." Under R.C. 4928.40, the Commission's authority to authorize any transition revenue ended no later than December 31, 2010.⁴¹ Additionally, R.C. 4928.141 provides that the recovery of transition revenue ended "on and after the date that the allowance is scheduled to end under the utility's plan." Based on the plain language of R.C. 4928.38 and R.C. 4928.141(A), there is no lawful basis for the Commission to authorize additional transition revenue or its equivalent under R.C. 4928.143(B)(2)(d).

Yet, the Commission has in the ESP order authorized transition revenue or its equivalent. As the Commission's Opinion and Order demonstrates, DP&L identified the

³⁹ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) ("*Sporn*").

⁴⁰ *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305 (2007).

⁴¹ R.C. 4928.40(A).

source of its revenue problem: its revenue is projected to decline due to low wholesale energy prices and customer migration.⁴² In finding that the charge is related to default service, the Commission has also determined that the charge relates to a generation service.⁴³ The rider authorizes increases in DP&L's revenue so as to produce a 7-11% return on equity⁴⁴ and recovers amounts "unrecoverable in a competitive market."⁴⁵ Thus, the SSR is permitting DP&L to recover transition revenue or its equivalent in violation of R.C. 4928.38. Thus, the Motion to Stay correctly states that the parties are likely to prevail in their appeal of the Commission's order authorizing the SSR because the Commission's authorization of the SSR authorizes DP&L to bill and collect transition revenue or its equivalent in violation of R.C. 4928.38.

As a basis for denying the motion to stay, DP&L also claims that the "Joint Movants cannot show that the collection of the SSR would irreparably harm customers or be contrary to the public interest." First, the motion shows that customers are harmed because they are paying an unlawful charge.⁴⁶ The motion further demonstrates that monetary harm is irreparable because the financial harm cannot be

⁴² Opinion and Order at 17 (Sept. 4, 2013).

⁴³ *Id.* at 21.

⁴⁴ *Id.* at 25.

⁴⁵ R.C. 4928.38(C).

⁴⁶ Motion to Stay at 5-6. See *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Order on Remand at 34-36 (Oct. 3, 2011), *aff'd*, *In re Columbus S. Power Co.*, Slip Op. 2014-Ohio-462 (Feb. 13, 2014).

reversed by a subsequent judicial order if the Court-fashioned no-refund rule is applied.⁴⁷

Ignoring the fact that customers are suffering an irreparable harm, DP&L instead focuses on the harm it may incur if the Commission grants the Motion to Stay. It again relies on the testimony that DP&L needs the SSR to assure its financial integrity and quality of service.⁴⁸ DP&L's claims, however, rest on a legal assumption that the Commission may authorize additional revenue to cover shortfalls resulting from low energy prices and customer migration. As discussed above, the Commission has no authority to prop up DP&L's earnings for its generation-related business. It cannot be harmed in a legally meaningful sense if it is not permitted to bill and collect an unlawful charge.

Further, even if DP&L were to suffer some legally relevant financial injury, the injury to customers is more severe. The Commission can structure the stay in such a way to make DP&L whole if the Court determines that the authorization of the SSR was lawful and reasonable, as discussed below. As between the irreparable injury that would be imposed on the customers of DP&L if relief is not ordered and the delay in

⁴⁷ Motion for Stay at 5-6, citing *Tilberry v. Body*, 24 Ohio St. 3d 117 (1986) and *Sinnott v. Agua-Chem, Inc.*, 116 Ohio St.3d 158 (2007). These cases were cited in support of the fact that monetary harm may be irreparable. DP&L ignores the import of these decisions when it attempts to distinguish them in its Memorandum Contra. Memorandum Contra at 9-10. See, also, *Ohio Turnpike Comm'n v. Texaco, Inc.*, 35 Ohio Misc. 99, 105 (1973).

⁴⁸ Memorandum Contra at 9-10.

collection that would be caused if the stay is ordered and DP&L ultimately prevails on the merits, the balance squarely falls in favor of granting the stay to protect customers.⁴⁹

Moreover, DP&L will not suffer an irreparable injury as it claims. “An irreparable injury is one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete.”⁵⁰ DP&L has alternatives to the SSR if it faces a current financial emergency. For example, DP&L could seek relief through an emergency rate case if its distribution rates are so insufficient as to threaten its reliable and safe provision of service.⁵¹ Alternatively, it could seek relief through a rate case if its distribution rates are unjust or unreasonable.⁵² Since it has not exercised either of the lawful alternatives, it cannot complain that a stay will injure its financial well-being.

Even if it were appropriate to consider DP&L’s financial well-being in the decision to grant the stay, DP&L’s generalizations regarding the financial need for the SSR do not justify denying the stay. DP&L failed to demonstrate a financial emergency warranting Commission intervention. Additionally, the financial shortfall that DP&L might face will result from the self-inflicted and continuing determination to retain generation-related assets when those assets could and should have been divested.⁵³

⁴⁹ *Internat’l Diamond Exchange Jewelers, Inc. v. U.S. Diamond and Gold Jewelers, Inc.*, 70 Ohio App. 3d 667, 673 (1991) (addressing the relative harm affecting the parties in ordering that an injunction of the airing of an advertisement be stayed pending appeal).

⁵⁰ *Ohio Turnpike Comm’n v. Texaco, Inc.*, 35 Ohio Misc. 99, 105 (1973).

⁵¹ R.C. 4909.16.

⁵² R.C. 4909.15(E), R.C. 4909.18, & R.C. 4909.19.

⁵³ For the discussion related to DP&L’s need for the SSR, see, e.g., Initial Brief of Industrial Energy Users-Ohio at 8-43 (May 20, 2013).

As the Commission balances the need for a stay versus the claims that DP&L will be injured if the stay is granted, the balance must be struck in favor of customers. It is inequitable to force customers to pay for DP&L's future self-inflicted injury.

Moreover, there is a solution the Commission can adopt to mitigate any alleged injury to DP&L. As the Motion to Stay indicated, the Commission could structure the stay to assure the recovery of carrying charges if the Court determines that the SSR was lawfully authorized.⁵⁴ In contrast to the irreparable injury customers are now suffering because they are being billed and are paying an unlawful charge, DP&L would not suffer any irreparable injury.

DP&L, however, also argues against a stay that included a provision permitting it to book carrying charges, repeating that it needs the SSR revenue.⁵⁵ Its response, however, exposes DP&L's claim for what it really is. If it understood that its claim for generation transition revenue and a subsidy were lawful, DP&L should be indifferent as to when it recovers the revenue if it is assured a carrying charge on the amounts that it may not be collecting as a result of a stay. Instead, DP&L argues that the Commission should not order a stay of the collection of the SSR with a provision permitting a carrying charge. DP&L's position demonstrates that it understands that a stay will frustrate its attempt to secure revenue that is not authorized by Ohio law: revenue

⁵⁴ Motion to Stay at 6.

⁵⁵ Memorandum Contra at 10-11.

collected before the Commission's order is reversed by the Court is money it can argue it should keep; a stay, however, will frustrate its immediate financial objectives.⁵⁶

D. A request for an order requiring DP&L to collect the SSR subject to refund is proper and will assure a just process for customers

DP&L argues that asking the Commission to order DP&L to collect the SSR subject to refund is inconsistent with the Court-fashioned no-refund rule.⁵⁷ DP&L further argues that the Court recently rejected a similar request for the rates to be collected subject to refund.⁵⁸ According to DP&L, the Commission "cannot deviate from that established case law in this proceeding."⁵⁹

Initially, *Keco* is not applicable to a determination of the Motion to Stay. In *Keco*, the Court found that under R.C. 4903.16, once a proceeding has been undertaken to reverse a Commission order, the appellant may secure a stay to suspend collection of the unlawful charges; otherwise, the utility shall collect the rates set by the Commission order. However, here, the appeal to the Supreme Court has not been made yet. The Commission still maintains jurisdiction over the case.

The Commission, in exercising its jurisdiction, has the power and authority to collect rates subject to refund. It has done so in the past on a number of occasions.⁶⁰

⁵⁶ As noted above, the Commission has stated to the Court that riders such as the SSR are subject to annual reconciliation. Thus, the assumption embedded in DP&L's "bill and keep" argument is not correct.

⁵⁷ Memorandum Contra at 11, citing *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957) ("*Keco*").

⁵⁸ *Id.*

⁵⁹ *Id.* at 12.

⁶⁰ See, e.g., *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and* {C45399:2 }

The Commission has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of orders. It should do so here. Doing so will assure a just process for customers.

III. CONCLUSION

The Commission has the authority to grant the requested relief, and the Joint Movants have satisfied the grounds supporting the requested relief. Accordingly, the Commission should grant the Motion to Stay.

Respectfully submitted,

/s/ Samuel C. Randazzo

Samuel C. Randazzo

Frank P. Darr

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

BRUCE J. WESTON

OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

Maureen R. Grady, Counsel of Record

Edmund "Tad" Berger

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Conditions of Service and Revise its Depreciation Accrual Rates and Reserves, Case No. 81-1058-EL-AIR, Entry (Nov. 17, 1982); In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978); In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, Case Nos. 08-917-EL-SSO, et al., Entry at ¶10 (May 25, 2011).

Maureen.grady@occ.ohio.gov
Edmund.berger@occ.ohio.gov

**ATTORNEYS FOR THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

/s/ David F. Boehm

David F. Boehm
Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Dboehm@BKLawfirm.com
Mkurtz@BKLawfirm.com
Jkylercohn@BKLawfirm.com

ATTORNEYS FOR OHIO ENERGY GROUP

/s/ Colleen L. Mooney

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
cmooney@ohiopartners.org

**ATTORNEY FOR OHIO PARTNERS FOR AFFORDABLE
ENERGY**

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply of Joint Movants to Memorandum Contra of the Dayton Power and Light Company to Motion for a Stay or, in the Alternative, Motion to Make DP&L's Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund* was sent by, or on behalf of, the undersigned counsel for Joint Movants to the following parties of record this 21st day of August 2014, *via* electronic transmission.

/s/ Frank P. Darr

Frank P. Darr

judi.sobecki@dplinc.com
randall.griffin@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com
arthur.meyer@dplinc.com
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
etter@occ.state.oh.us
serio@occ.state.oh.us
berger@occ.state.oh.us
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com
philip.sineneng@ThompsonHine.com
bmcMahon@emh-law.com
elizabeth.watts@duke-energy.com
rocco.d'ascenzo@duke-energy.com
ricks@ohanet.org
tobrien@bricker.com
barth.royer@aol.com
gary.a.jeffries@dom.com
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
vparisi@igsenergy.com

barthroyer@aol.com
trent@theoec.org
cathy@theoec.org
williams.toddm@gmail.com
ejacobs@ablelaw.org
mhpeticoff@vorys.com
smhoward@vorys.com
david.fein@constellation.com
cynthia.a.fonner@constellation.com
Tasha.hamilton@constellation.com
myurick@taftlaw.com
zkraivitz@taftlaw.com
mhpeticoff@vorys.com
smhoward@vorys.com
Tony_Long@ham.honda.com
Stephen.bennett@exeloncorp.com
LGearhardt@ofbf.org
dconway@porterwright.com
aemerson@porterwright.com
haydenm@firstenergycorp.com
coneil@calfee.com
shannon@calfee.com
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
dakutik@jonesday.com
aehaedt@jonesday.com

jejadwin@aep.com
Thomas.Melone@AllcoUS.com
joseph.clark@directenergy.com
christopher.miller@icemiller.com
gregory.dunn@icemiller.com
alan.starkoff@icemiller.com
ssolberg@EimerStahl.com
stephanie.Chmiel@ThompsonHine.com
michael.Dillard@ThompsonHine.com
philip.sineneng@ThompsonHine.com
mjsatterwhite@aep.com
stnourse@aep.com
bojko@carpenterlipps.com
sechler@carpenterlipps.com
matt@matthewcoxlaw.com
gpoulos@enernoc.com
william.wright@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
steven.beeler@puc.state.oh.us
devin.parram@puc.state.oh.us
gregory.price@puc.state.oh.us
mandy.willey@puc.state.oh.us
bryce.mckenney@puc.state.oh.us
henryeckhart@aol.com
Wis29@yahoo.com
berger@occ.state.oh.us
bill.wells@wpafb.af.mil
chris.thompson.2@tyndall.af.mil
mchristensen@columbuslaw.org
chris.michael@icemiller.com
williams@whitt-sturtevant.com
mohler@carpenterlipps.com
stephen.chriss@wal-mart.com

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Reply of Joint Movants to Memorandum Contra of the Dayton Power and Light Company to Motion for Stay electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio