

**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. In the Matter of the Application of))))	Case No. 12-426-EL-SSO
 The Dayton Power and Light Company for Approval of Revised Tariffs. In the Matter of the Application of)))	 Case No. 12-427-EL-ATA
 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

**JOINT MOTION OF INDUSTRIAL ENERGY USERS-OHIO
AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
FOR AN ORDER REQUIRING THAT THE SERVICE STABILITY RIDER
BE COLLECTED SUBJECT TO REFUND AND REQUEST FOR EXPEDITED RULING
AND MEMORANDUM IN SUPPORT**

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MAY 17, 2016

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In its orders in this case, the Public Utilities Commission of Ohio ("Commission") authorized The Dayton Power and Light Company ("DP&L") to collect \$110 million annually through a nonbypassable charge, the Service Stability Rider ("SSR"), to replace revenue DP&L claimed it lost to competition and low wholesale energy and capacity prices. The Ohio Supreme Court ("Court") recently concluded that the Commission had

no authority to authorize such charges.¹ To prevent the further unlawful collection of the SSR and to protect the 600,000 customers of DP&L, Industrial Energy Users-Ohio (“IEU-Ohio”) and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “Consumer Advocates”) move the Commission pursuant to Rule 4901-1-12, Ohio Administrative Code (“O.A.C.”), to issue an order prospectively modifying its authorization of the SSR such that all prospectively collected revenue under the rider is subject to refund. Consumer Advocates further request that the Commission grant this Motion on an expedited basis.²

The reasons supporting this Motion are set out in the accompanying Memorandum in Support.

Respectfully submitted,

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¹ *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Slip Opinion No. 2016-Ohio-1608, ¶ 13-25 (“*Columbus Southern*”).

² Rule 4901-1-12(C), O.A.C.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Electric utilities were provided one opportunity to seek approval to collect transition revenue. Under this limited opportunity, DP&L was authorized to collect \$441 million in transition revenue from its customers beginning in 2001.³ The period to collect transition revenue could not extend beyond 2010, and utilities have no further right to collect

³ IEU-Ohio Ex. 14 at 30.

transition revenue or its equivalent.⁴ Additionally, the Commission is prohibited by R.C. 4928.38 from authorizing a utility to collect transition revenue or its equivalent.

In two decisions issued in 2012 and 2013 in electric security plan (“ESP”) cases involving Ohio Power Company (“AEP-Ohio”) and DP&L, respectively, the Commission authorized the collection of transition revenue or its equivalent in violation of R.C. 4928.38. For AEP-Ohio, the collection of transition revenue or its equivalent occurred through its Retail Stability Rider (“RSR”); for DP&L the collection of transition revenue or its equivalent occurs through its SSR.⁵

In the two ESP cases, the Commission approved charges under nearly identical rationales that permitted the utilities to replace revenue lost to competition and low wholesale energy and capacity prices. The Commission also explicitly relied upon its authorization of AEP-Ohio’s charge as a basis for authorizing DP&L’s charge.⁶

However, in *Columbus Southern*, the Court recently held that the Commission acted unlawfully and unreasonably when it authorized AEP-Ohio’s RSR.⁷ Finding that the nature of AEP-Ohio’s charge allowed AEP-Ohio to collect the equivalent of transition revenue, the Court held the Commission had violated the prohibition in R.C. 4928.38 and

⁴ R.C. 4928.40.

⁵ The authorization of these charges resulted in customers being required to pay the utilities nearly a billion dollars of transition revenue; \$508 million in the case of AEP-Ohio’s RSR charge, and \$330 million in the case of DP&L’s SSR charge. Opinion and Order at 25-26 (Sept. 4, 2013); Entry Nunc Pro Tunc at 2 (Sept. 6, 2013); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 35 (Aug. 8, 2012) (“AEP-Ohio ESP II Order”).

⁶ Opinion and Order at 22 (Sept. 4, 2013).

⁷ *Columbus Southern*, 2016-Ohio-1608, ¶ 13-25.

reversed and remanded the case to the Commission for further proceedings consistent with the Court's decision.

The implications of the Court's holding in *Columbus Southern*, however, reach beyond the confines of the AEP-Ohio appeal. Because DP&L's arguments in support of the SSR and the rationale adopted by the Commission for its authorization of the SSR are nearly identical to the Commission's authorization of AEP-Ohio's RSR, the Court's holding in *Columbus Southern* is controlling with respect to the SSR and indicates that a reversal of the Commission's authorization of DP&L's SSR is likely.

To prevent further injury to customers as a result of the Commission's unlawful authorization of the SSR, DP&L's customers are requesting immediate action by the Commission.⁸ The collection period for the SSR ends December 31, 2016. As each month goes by, DP&L's customers pay nearly \$10 million in unlawful transition revenue or its equivalent to DP&L, and have already paid approximately \$250 million.

To mitigate further injury to customers, Consumer Advocates request that the Commission immediately modify its authorization of the SSR to require that all revenue prospectively collected through the SSR be collected subject to refund.

II. ARGUMENT

In a 2012 ESP case, the Commission approved the RSR as a nonbypassable charge for AEP-Ohio. The RSR was designed to replace revenue AEP-Ohio lost as a result of generation competition and low wholesale energy and capacity prices to permit

⁸ On May 12, 2016, IEU-Ohio and OCC also filed a Joint Motion with the Court requesting the Court to immediately vacate the Commission's orders authorizing the SSR and direct the Commission to promptly suspend its authorization of the SSR.

AEP-Ohio to earn a return on equity between 7 and 11 percent.⁹ The authorization of AEP-Ohio's charge was appealed to the Court.

While the Commission was reviewing AEP-Ohio's ESP application and request for the RSR, DP&L filed an application for an ESP that contained a request for authorization of the SSR. In its application, DP&L claimed that it needed its charge to make up for revenue lost due to increased customer switching, declining wholesale energy prices, and declining capacity prices.¹⁰ The Commission authorized DP&L's SSR charge and permitted DP&L to collect \$110 million annually from its customers for three years through the end of 2016.¹¹ The authorization of DP&L's charge was also appealed to the Court.

In the first case in which the Court has reached a decision, the Court in *Columbus Southern* agreed with customers that the Commission had acted unlawfully and unreasonably and reversed and remanded the AEP-Ohio case to the Commission. As the Court explained, "[u]tilities had until December 31, 2005 ... to receive generation transition revenue ... [and] were also permitted to receive transition revenue associated with regulatory assets ... until December 31, 2010."¹² "After that date, R.C. 4928.38 prohibits the commission from 'authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility.'"¹³ The Court also noted that subsequent legislation enacted in 2008 further "expressly prohibits the recovery of transition costs" under "a standard service offer made through an ESP."¹⁴

⁹ See *Columbus Southern*, at ¶ 24; AEP-Ohio ESP II Order at 34-35.

¹⁰ Opinion and Order at 17 (Sept. 4, 2013).

¹¹ *Id.* at 25-26; Entry Nunc Pro Tunc at 2 (Sept. 6, 2013).

¹² *Columbus Southern*, at ¶ 16.

¹³ *Id.*

¹⁴ *Id.* at ¶ 17.

Turning to the record in the AEP-Ohio case, the Court looked at the true nature of the RSR to determine if it allowed the collection of transition revenue or its equivalent. The Court found that AEP-Ohio “proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.”¹⁵ To achieve this result, AEP-Ohio requested that the Commission “guarantee recovery of lost revenue” through the RSR related to three sources of generation revenue: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching.¹⁶ “According to [AEP-Ohio’s] witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015.”¹⁷ The Court also noted that the Commission had approved the RSR “to provide AEP with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP.”¹⁸

The Court also rejected the Commission’s claim that the RSR was not transition revenue because AEP-Ohio did not seek recovery of transition revenue.¹⁹ “[T]he fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue under the guise of the RSR.”²⁰ “By inserting the phrase ‘any equivalent revenues,’ the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that

¹⁵ *Id.* at ¶ 23.

¹⁶ *Id.* at ¶ 23-24.

¹⁷ *Id.* at ¶ 23.

¹⁸ *Id.* at ¶ 8.

¹⁹ *Id.* at ¶ 20.

²⁰ *Id.* at ¶ 21.

were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name.”²¹ Accordingly, the Court concluded “that the Commission erred in focusing solely on whether AEP had expressly sought to receive transition revenues rather than looking at the nature of the costs recovered through the RSR.”²²

Like AEP-Ohio’s RSR, DP&L’s SSR permits DP&L to collect transition revenue or its equivalent. The “nature” of the SSR in this case is identical to the nature of the RSR that the Court held was an unlawful transition charge. DP&L proposed the SSR for a similar reason as AEP-Ohio: to make up for revenue DP&L was not receiving in the competitive generation market primarily related to “increased [customer] switching, declining wholesale prices, and declining capacity prices.”²³ Further, the SSR was designed to ensure that DP&L collected enough revenue through its charge to earn a return on equity between 7 and 11 percent, just as the Commission had authorized for AEP-Ohio.²⁴ The RSR and SSR were also related to claims that they would protect the utilities’ financial integrity.²⁵

The arguments and findings of DP&L and the Commission, respectively, confirm that the RSR and SSR are equivalent unlawful transition charges. In its post-hearing

²¹ *Id.*

²² *Id.* at ¶ 25.

²³ Compare Opinion and Order at 17 (Sept. 4, 2013); with *Columbus Southern*, at ¶ 24 (in calculating a revenue requirement for AEP-Ohio’s charge, the Commission focused on three generation-related factors: nonfuel generation revenue, capacity revenues, and customer switching). DP&L also confirmed during the hearing that the SSR charge was driven solely by its generation business as it admitted that its revenue from its other two lines of business, transmission and distribution, were adequate and would remain so. DP&L Ex. 1 at 13; Tr. Vol. I at 118; Tr. Vol. I at 150.

²⁴ Opinion and Order at 25 (concluding a return on equity range of 7-11% for DP&L’s charge was reasonable because it was consistent with the Commission’s prior treatment of AEP-Ohio’s charge).

²⁵ *Columbus Southern*, at ¶ 8; Opinion and Order at 22 (Sept. 4, 2013).

briefs, DP&L argued that the Commission should approve its charge because “the SSR is substantially similar to AEP's Rate Stabilization Rider (RSR) approved by the Commission.”²⁶ The Commission also cited to its approval of AEP-Ohio’s charge as a basis for authorizing the magnitude of DP&L’s charge.²⁷ The Commission further found that its authorization of DP&L’s charge and rejection of arguments that DP&L’s charge would allow DP&L to collect transition revenue or its equivalent was “consistent with [its] decision in the *AEP ESP II Case*, in which [it] determined that AEP-Ohio's proposed RSR did not allow for the collection of inappropriate transition revenues or stranded costs.”²⁸ Finally, in its amicus brief filed in the AEP-Ohio appeal, DP&L argued to the Court that the record supporting the SSR “closely resembles” the record that AEP-Ohio developed in support of the RSR.²⁹

Further, as it had done with respect to the RSR, the Commission rejected claims that the SSR unlawfully allowed DP&L to collect transition revenue or its equivalent because DP&L had not requested additional transition revenue.³⁰ As noted above, the Court has already rejected the Commission’s rationale and held that a charge could be overturned if the “nature” of the charge was equivalent to a transition charge.³¹

Simply put, DP&L’s SSR is substantially similar to AEP-Ohio’s RSR that was held to be an unlawful transition charge.

²⁶ *Id.* at 17.

²⁷ *Id.* at 25.

²⁸ *Id.* at 22.

²⁹ *Columbus Southern*, S.Ct. Case No. 2013-521, Merit Brief of Amicus Curiae DP&L in Support of Appellee PUCO at 6 (Oct. 21, 2013).

³⁰ Opinion and Order at 22 (Sept. 4, 2013).

³¹ *Columbus Southern*, at ¶ 25.

Customers have previously sought to prevent the Commission from authorizing the SSR, sought to stay the SSR, and requested that the Commission authorize the SSR subject to refund. The Commission denied these customer protections. The Court's subsequent action in overturning the Commission's authorization of AEP-Ohio's RSR as an unlawful transition charge warrants the Commission reconsidering whether the SSR should be ordered collected subject to refund.

The relief Consumer Advocates seek through this Motion is supported by the Commission's prior actions. In AEP-Ohio's first ESP case, parties appealed the Commission's authorization of the provider of last resort ("POLR") charge and the collection of carrying charges on environmental investment.³² On appeal, the Court reversed the Commission, holding that the Commission's authorization of the POLR charge was against the manifest weight of the evidence.³³ The Court also reversed the Commission's authorization of the collection of carrying charges on environmental investment holding that the Commission erred in concluding that "R.C. 4928.143(B)(2) permits ESPs to include unlisted items."³⁴ On remand, the Court held that the Commission could revisit its authorizations of the charges if it chose to do so.³⁵

Following the Court's decision, a group of intervenors filed a motion requesting that the Commission direct AEP-Ohio to remove the POLR charges and environmental carrying cost charges from its tariffs. One week later, the Commission issued an entry

³² *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 22-35.

³³ *Id.* at ¶ 30

³⁴ *Id.* at ¶ 35.

³⁵ *Id.* at ¶ 30, 35.

ordering AEP-Ohio to file tariff sheets removing the POLR and environmental carrying cost charges.³⁶

In response to the Commission's directive, AEP-Ohio requested that the Commission alternatively allow the rates to continue, subject to refund, while the Commission addressed the issues remanded by the Court.³⁷ The Commission granted AEP-Ohio's request.³⁸ The Commission found that this was "the most reasonable means to facilitate a just process for AEP-Ohio customers and the Companies."³⁹ In other contexts, the Commission has also ordered that charges be collected subject to refund to protect customers.⁴⁰

The Court has rejected the Commission's rationale for authorizing the SSR in the *Columbus Southern* case, but DP&L continues to collect nearly \$10 million monthly under the Commission's authorization of the SSR. To mitigate the injury to DP&L's customers, the Commission should take the minimal step of ordering that future collections under the SSR be collected subject to refund.

While mitigating the harm to customers from the unlawful charge, prospectively collecting the SSR revenue subject to refund will not cause any undue harm to DP&L. If

³⁶ *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 2 (May 4, 2014) ("AEP-Ohio ESP I").

³⁷ *AEP-Ohio ESP I*, Entry at 3 (May 25, 2011)

³⁸ *Id.* at 4 ("Upon further consideration of the issues raised by the parties to these ESP remand proceedings, we find AEP-Ohio's motion to make the currently effective tariff rates, subject to refund, to be a reasonable request until the Commission specifically orders otherwise on remand.").

³⁹ *Id.*

⁴⁰ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation Facility*, Case No. 05-376-EL-UNC, Entry on Rehearing at 16 (June 28, 2006).

the Court agrees that DP&L's SSR is an unlawful transition charge, then DP&L never had a legitimate claim to the revenue collected through the SSR. If the Court affirms the Commission's authorization of the SSR, the Commission can lift the refund condition and DP&L will have suffered no harm. It would be inequitable, however, to deny the relief sought herein, potentially foreclosing customers' ability to obtain a remedy for the prospective SSR charges paid by customers until the Court issues a decision. In such circumstances in which there would be harm to one party (customers) and no harm to the other (DP&L), the balancing of equities squarely supports granting the relief sought herein.⁴¹

Ensuring that customers may receive a refund for amounts prospectively collected through the SSR fulfils the public interest in ensuring that regulated entities do not receive unlawful windfalls at customers' expense.⁴² The Commission has also held that under similar circumstances, setting the rates subject to refund was "the most reasonable means to facilitate a just process for [] customers and the [utility]."⁴³

Finally, because DP&L's customers continue to pay the unlawful SSR charge and will continue to pay the charge until the Commission takes action, Consumer Advocates request that the Commission rule on this motion on an expedited basis and promptly direct DP&L to begin prospectively collecting the SSR subject to refund.

⁴¹ *Internat'l Diamond Exchange Jewelers, Inc. v. US. Diamond and Gold Jewelers, Inc.*, 70 Ohio App. 3d 667, 885 (1991) (addressing the relative harm affecting the parties in ordering that an injunction of the airing of an advertisement be stayed pending appeal).

⁴² R.C. 4905.22 (Commission must ensure rates are reasonable).

⁴³ *AEP-Ohio ESP I*, Entry at 4 (May 25, 2011)

III. CONCLUSION

For the reasons discussed herein, IEU-Ohio and OCC jointly request that the Commission expeditiously order DP&L to prospectively collect the SSR rates subject to refund pending a Court ruling in the appeal of DP&L's current ESP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO'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 *Joint Motion of Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel for an Order Requiring that the Service Stability Rider be Collected Subject to Refund and Request for Expedited Ruling and Memorandum in Support* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 17th day of May 2016, via electronic transmission.

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Summary: Motion Joint Motion of Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel for an Order Requiring that the Service Stability Rider be Collected Subject to Refund and Request for Expedited Ruling and Memorandum in Support electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio and Office of the Ohio Consumers' Counsel