

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 12-426-EL-SSO  
The Dayton Power and Light Company for  
Approval of Its Electric Security Plan :

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

In the Matter of the Application of : Case No. 12-428-EL-AAM  
The Dayton Power and Light Company for  
Approval of Certain Accounting Authority :

In the Matter of the Application of : Case No. 12-429-EL-WVR  
The Dayton Power and Light Company for  
the Waiver of Certain Commission Rules :

In the Matter of the Application of : Case No. 12-672-EL-RDR  
The Dayton Power and Light Company  
to Establish Tariff Riders :

---

**MEMORANDUM OF THE DAYTON POWER AND LIGHT COMPANY IN  
OPPOSITION TO THE MOTION OF INDUSTRIAL ENERGY USERS-OHIO AND  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL FOR AN ORDER  
VACATING THE AUTHORIZATION OF THE SERVICE STABILITY RIDER**

---

**I. INTRODUCTION AND SUMMARY**

For the second time, Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (together, "Joint Movants") ask the Commission to modify its authorization of the Service Stability Rider ("SSR"), despite a pending appeal from this proceeding: Supreme Court of Ohio Case No. 2014-1505.<sup>1</sup> The Joint Motion should be denied for two reasons.

---

<sup>1</sup> June 21, 2016 Motion of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel for an Order Vacating the Authorization of the Service Stability Rider ("Joint Motion"); May 17, 2016 Joint Motion of  
(footnote cont'd...)

First, the Commission lacks jurisdiction to consider the Joint Motion. Although the Supreme Court of Ohio recently announced an opinion reversing the Commission's decision in this proceeding,<sup>2</sup> the Court has not issued a mandate returning jurisdiction to the Commission. The Supreme Court's Rules of Practice prohibit the issuance of a mandate until ten days after entry of judgment. S.Ct.Prac.R. 18.04(A). The Supreme Court repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). No statute or rule allows the Commission to modify an order pending before the Supreme Court; therefore, the Commission cannot currently grant the relief requested by Joint Movants.

Second, in executing the Supreme Court's decision, the Commission must determine what an "appropriate order" should be on remand. Cleveland Elec. Illuminating Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 116-17, 346 N.E.2d 778 (1976) (the Commission should issue "an appropriate order" that "replaces the reversed order" following a reversal by the Supreme Court and receipt of the Court's mandate). Simply vacating the SSR based on the Court's one-sentence ruling, In re Application of Dayton Power & Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490 (Sup. Ct. Ohio June 20, 2016), without considering what is "appropriate" for DP&L in this case would cede ratemaking authority to the Court. City of Dayton v. Pub. Util. Comm., 174 Ohio St. 160, 162, 187 N.E.2d 150 (1962).

---

(...cont'd)

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.

<sup>2</sup> In re Application of Dayton Power & Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490 (Sup. Ct. Ohio June 20, 2016).

**II. THE COMMISSION LACKS JURISDICTION TO MODIFY THE SSR BECAUSE THE SUPREME COURT HAS NOT ISSUED A MANDATE RETURNING JURISDICTION TO THE COMMISSION**

The Supreme Court of Ohio repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). Accord: Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div., 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph three of the syllabus; State ex rel. Gatlin v. Yellow Freight Sys., Inc., 18 Ohio St.3d 246, 249, 480 N.E.2d 487 (1985); Todd v. Gen. Motors Corp., 65 Ohio St.2d 18, 19, 417 N.E.2d 1017 (1981). That holding is consistent with the Ohio rule that "[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." Howard v. Catholic Social Servs., 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994) (per curiam) (emphasis added).

In Title 49, the General Assembly has adopted a comprehensive framework for review of final orders of the Commission, which includes applications for rehearing and direct appeals to the Supreme Court. R.C. 4903.10 through 4903.13. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. Accord: Penn Cent. Transp. Co. v. Pub. Util. Comm., 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), paragraph one of the syllabus (holding that the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute"); Ohio Bus Line, Inc. v. Pub. Util. Comm., 29 Ohio St.2d 222, 226, 280 N.E.2d 907

(1972) (holding that the Commission "has only such jurisdiction and authority to act as is vested in it by statute"). No statute in that framework allows the Commission to consider its orders while they are pending before the Supreme Court. Indeed, such consideration would be directly inconsistent with the Court's jurisdiction to "reverse[], vacate[], or modif[y]" the Commission's orders. R.C. 4903.13. Accord: Howard at 146. Since the General Assembly has not authorized the Commission to consider its orders while they are pending before the Court, the Commission lacks jurisdiction to modify the SSR. The Joint Motion should be denied for this reason alone.

Joint Movants suggest in a footnote (p. 5 n.2) that "the Commission could alternatively order that the SSR be prospectively collected subject to refund until the Court's mandate is issued." However, as DP&L has demonstrated,<sup>3</sup> the Commission not only lacks jurisdiction to modify the SSR, but also cannot order DP&L to collect the charge subject to refund. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal.").

---

<sup>3</sup> May 24, 2016 The Dayton Power and Light Company's Memorandum in Opposition to the 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. DP&L incorporates by reference the arguments raised in that Memorandum as if fully restated here.

**III. THE COMMISSION SHOULD ISSUE AN APPROPRIATE ORDER ON REMAND, RATHER THAN SIMPLY VACATING THE SSR**

The Supreme Court's opinion states, in its entirety: "The decision of the Public Utilities Commission is reversed on the authority of In re Application of Columbus S. Power Co., \_\_ Ohio St.3d \_\_, 2016-Ohio-1608, \_\_ N.E.3d \_\_." In re Application of Dayton Power & Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490 (Sup. Ct. Ohio June 20, 2016), ¶ 1.

When the Supreme Court reverses a Commission decision:

"the statutes [of Title 49] make clear [1] that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; [2] that the schedule remains in effect until replaced by a further order of the commission; [3] that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and [4] that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."

Cleveland Elec. Illuminating Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 116-17, 346 N.E.2d 778 (1976) (emphasis added). Accord: R.C. 4909.17 ("No rate . . . become[s] effective until the public utilities commission, by order, determines it to be just and reasonable . . ."); R.C. 4909.15(E)(2)(b) (providing that after the commission orders that a new rate be substituted for an existing one, "no change in the rate . . . shall be made . . . by such public utility without the order of the commission, and any other rate . . . is prohibited").

Simply excising the SSR, as Joint Movants demand (pp. 4-5), would relinquish the Commission's ratemaking authority to the Court, which has long eschewed such power. City of Dayton v. Pub. Util. Comm., 174 Ohio St. 160, 162, 187 N.E.2d 150 (1962) (per curiam)

("The members of this court are neither accountants nor engineers, and manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult question of the reasonableness of the order than is the commission."). Instead, the Commission must issue "an appropriate order," Cleveland Elec. at 116-17, to the company to implement new rates.

For these reasons, the Joint Motion should be denied.

Respectfully submitted,

/s/ Charles J. Faruki

Charles J. Faruki (0010417)

(Counsel of Record)

Jeffrey S. Sharkey (0067892)

FARUKI IRELAND & COX P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3747

Telecopier: (937) 227-3717

Email: cfaruki@ficlaw.com

jsharkey@ficlaw.com

Attorneys for The Dayton Power  
and Light Company

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of The Dayton Power and Light Company in Opposition to the Motion of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel for an Order Vacating the Authorization of the Service Stability Rider has been served via electronic mail upon the following counsel of record, this 28th day of June, 2016:

Philip B. Sineneng, Esq.  
THOMPSON HINE LLP  
41 South High Street, Suite 1700  
Columbus, OH 43215  
Philip.Sineneng@ThompsonHine.com

Mark A. Hayden, Esq.  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com

Amy B. Spiller, Esq.  
Deputy General Counsel  
Jeanne W. Kingery, Esq.  
Associate General Counsel  
DUKE ENERGY RETAIL SALES, LLC and  
DUKE ENERGY COMMERCIAL ASSET  
MANAGEMENT, INC.  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Amy.Spiller@duke-energy.com  
Jeanne.Kingery@duke-energy.com

James F. Lang, Esq.  
Laura C. McBride, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, OH 44114  
jlang@calfee.com  
lmcbride@calfee.com

Attorneys for Duke Energy Retail Sales, LLC and  
Duke Energy Commercial Asset Management,  
Inc.

N. Trevor Alexander, Esq.  
CALFEE, HALTER & GRISWOLD LLP  
1100 Fifth Third Center  
21 E. State Street  
Columbus, OH 43215-4243  
talexander@calfee.com

Stephen Chriss, Esq.  
Wal-Mart Corporation  
702 Southwest 8th Street  
Bentonville, AR 72716-021  
Stephen.Chriss@wal-mart.com

David A. Kutik, Esq.  
JONES DAY  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
dakutik@jonesday.com

Attorneys for Wal-Mart Stores East, LP  
and Sam's East, Inc.

Attorney for FirstEnergy Solutions Corp.

Samuel C. Randazzo, Esq.  
Frank P. Darr, Esq.  
Matthew R. Pritchard, Esq.  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17th Floor  
Columbus, OH 43215-4225  
sam@mwncmh.com  
fdarr@mwncmh.com  
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

M. Anthony Long, Esq.  
Senior Assistant Counsel  
HONDA OF AMERICA MFG., INC.  
24000 Honda Parkway  
Marysville, OH 43040  
tony\_long@ham.honda.com

Attorney for Honda of America Mfg., Inc.

David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
BOEHM, KURTZ & LOWRY  
36 East Seventh Street Suite 1510  
Cincinnati, OH 45202-4454  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com

Attorneys for Ohio Energy Group

Gregory J. Poulos, Esq.  
EnerNOC, Inc.  
471 East Broad Street  
Columbus, OH 43215  
Telephone: (614) 507-7377  
gpoulos@enernoc.com

Attorney for EnerNOC, Inc.

Robert A. McMahon, Esq.  
EBERLY MCMAHON LLC  
2321 Kemper Lane, Suite 100  
Cincinnati, OH 45206  
bmcMahon@emh-law.com

Rocco O. D'Ascenzo, Esq.  
Associate General Counsel  
Elizabeth Watts, Esq.  
Associate General Counsel  
DUKE ENERGY OHIO, INC.  
139 East Fourth Street, 1303-Main  
Cincinnati, OH 45202  
Elizabeth.Watts@duke-energy.com  
Rocco.D'Ascenzo@duke-energy.com

Attorneys for Duke Energy Ohio, Inc.

Jay E. Jadwin, Esq.  
AMERICAN ELECTRIC POWER  
SERVICE CORPORATION  
155 W. Nationwide Blvd., Suite 500  
Columbus, OH 43215  
jejadwin@aep.com

Attorney for AEP Retail Energy Partners LLC

Richard L. Sites, Esq.  
General Counsel and Senior Director of  
Health Policy  
OHIO HOSPITAL ASSOCIATION  
155 East Broad Street, 15th Floor  
Columbus, OH 43215-3620  
ricks@ohanet.org

Matthew W. Warnock, Esq.  
Dylan F. Borchers, Esq.  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
mwarnock@bricker.com  
dborchers@bricker.com

Attorneys for Ohio Hospital Association



Colleen L. Mooney, Esq.  
OHIO PARTNERS FOR AFFORDABLE  
ENERGY  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839-1793  
cmooney2@columbus.rr.com  
Attorney for Ohio Partners for Affordable Energy

Ryan P. O'Rourke  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, OH 43215  
Email: o'rourke@carpenterlipps.com

Attorneys for The Kroger Company

Mark A. Whitt, Esq.  
Andrew J. Campbell, Esq.  
WHITT STURTEVANT LLP  
The KeyBank Building  
88 East Broad Street, Suite 1590  
Columbus, OH 43215  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com

Vincent Parisi, Esq.  
INTERSTATE GAS SUPPLY, INC.  
6100 Emerald Parkway  
Dublin, OH 43016  
vparisi@igsenergy.com  
mswhite@igsenergy.com

Attorneys for Interstate Gas Supply, Inc.

Trent A. Dougherty, Esq.  
OHIO ENVIRONMENTAL COUNCIL  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212-3449  
trent@theoec.org

Attorneys for the Ohio Environmental Council

Thomas W. McNamee, Esq.  
Assistant Attorney General  
180 East Broad Street  
Columbus, OH 43215  
Thomas.mcnamee@ohioattorneygeneral.gov

Attorneys for the Staff of the Public Utilities  
Commission of Ohio

Maureen R. Willis, Esq.  
Assistant Consumers' Counsel  
Office of The Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
Maureen.willis@occ.ohio.gov

Attorneys for Office of the Ohio Consumers'  
Counsel

M. Howard Petricoff, Esq.  
Stephen M. Howard, Esq.  
VORYS, SATER, SEYMOUR AND  
PEASE LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
mhpetricoff@vorys.com  
smhoward@vorys.com

Attorneys for the Retail Energy Supply  
Association, Exelon Generation Company,  
LLC, Exelon Energy Company, Inc.,  
Constellation Energy Commodities Group,  
Inc., and Constellation NewEnergy, Inc.

Ellis Jacobs, Esq.  
Advocates for Basic Legal Equality, Inc.  
130 West Second Street, Suite 700 East  
Dayton, OH 45402  
ejacobs@ablelaw.org

Attorney for Edgemont Neighborhood  
Coalition

Jennifer L. Spinosi, Esq.  
21 East State Street, Suite 1900  
Columbus, OH 43215  
jennifer.spinosi@directenergy.com

Christopher L. Miller, Esq.  
Gregory J. Dunn, Esq.  
Alan G. Starkoff, Esq.  
ICE MILLER LLP  
2540 West Street  
Columbus, OH 43215  
Christopher.Miller@icemiller.com  
Gregory.Dunn@icemiller.com

Attorneys for City of Dayton, Ohio,  
Direct Energy Services, LLC  
and Direct Energy Business, LLC

Matthew J. Satterwhite, Esq.  
Steven T. Nourse, Esq.  
AMERICAN ELECTRIC POWER SERVICE  
CORPORATION  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215  
mjsatterwhite@aep.com  
stnourse@aep.com

Attorneys for Ohio Power Company

Matthew R. Cox, Esq.  
MATTHEW COX LAW, LTD.  
4145 St. Theresa Blvd.  
Avon, OH 44011  
matt@matthewcoxlaw.com

Attorney for the Council of Smaller Enterprises

Stephen Bennett, Manager  
State Government Affairs  
300 Exelon Way  
Kenneth Square, PA 19348  
stephen.bennett@exeloncorp.com

Bill C. Wells, Esq.  
AFMCLO/CL  
Industrial Facilities Division  
Bldg 266, Area A  
Wright Patterson AFB, OH 45433  
bill.wells@wpafb.af.mil

Christopher C. Thompson, Esq.  
Staff Attorney (admitted *pro hac vice*)  
USAF Utility Law Field Support Center  
139 Barnes Drive, Suite 1  
Tyndall AFB, FL 32403-5319

Attorneys for Federal Executive Agencies

Kimberly W. Bojko, Esq.  
Joel E. Sechler, Esq.  
Mallory M. Mohler, Esq.  
CARPENTER LIPPS & LELAND LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, OH 43215  
Bojko@carpenterlipps.com  
Sechler@carpenterlipps.com  
Mohler@carpenterlipps.com

Attorneys for SolarVision, LLC

Scott C. Solberg, Esq.  
Eimer Stahl LLP  
224 South Michigan Avenue, Suite 1100  
Chicago, OH 60604  
ssolberg@eimerstahl.com

Attorney for Exelon Generation Company,  
LLC

Cynthia Fonner Brady, Esq.  
Assistant General Counsel  
EXELON BUSINESS SERVICES COMPANY  
4300 Winfield Road  
Warrenville, IL 60555  
Cynthia.Brady@constellation.com

Attorney for Constellation  
an Exelon Company

Lt Col John C. Degnan  
Thomas A. Jernigan  
Ebony M. Payton  
Federal Executive Agencies (FAE)  
139 Barnes Drive, Suite 1  
Tyndall AFB FL 32403  
John.Degnan@us.af.mil  
Thomas.Jernigan.3@us.af.mil  
Ebony.Payton.ctr@us.af.mil

Attorney for Federal Executive Agencies

Robert A. Brundrett, Esq.  
The Ohio Manufacturers' Association  
33 North High Street  
Columbus, OH 43215  
Email: rbrundrett@ohiomfg.com

Attorneys for The Ohio Manufacturers'  
Association Energy Group

Mary W. Christensen, Esq.  
Christensen Law Office LLC  
8760 Orion Place, Suite 300  
Columbus, OH 43240-2109  
mchristensen@columbuslaw.org

Attorneys for People Working Cooperatively,  
Inc.

/s/ Jeffrey S. Sharkey  
Jeffrey S. Sharkey

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/28/2016 10:54:43 AM**

**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: Memorandum Memorandum of The Dayton Power and Light Company in Opposition to the Motion of Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel for an Order Vacating the Authorization of the Service Stability Rider electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company