

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-395-EL-SSO
Approval of Its Electric Security Plan)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-396-EL-ATA
Approval of Revised Tariffs)

In the Matter of the Application of)
The Dayton Power and Light Company for) Case No. 16-397-EL-AAM
Approval of Certain Accounting Authority)
Pursuant to Ohio Rev. Code § 4905.13)

**SURREPLY OF INDUSTRIAL ENERGY USERS-OHIO OPPOSING THE MOTION OF THE DAYTON
POWER AND LIGHT COMPANY TO IMPLEMENT THE SSR EXTENSION**

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I. INTRODUCTION

As Industrial Energy Users-Ohio (“IEU-Ohio”) demonstrated in its Memorandum Contra the Motion of the Dayton Power and Light Company (“DP&L”), authorization of an increase in the Service Stability Rider-Extension (“SSR-E”) would permit DP&L to bill and collect transition revenue or its equivalent in violation of R.C. 4928.38. In its Reply, DP&L has argued that the Public Utilities Commission of Ohio (“Commission”) may ignore the prohibition in R.C. 4928.38 and presented two claims to support that argument: first, that the “notwithstanding” clause in R.C. 4928.143(B)(2) permits the Commission to authorize DP&L to bill and collect transition revenue or its equivalent despite the prohibition of such a charge under R.C. 4928.38; and second, that the Commission can ignore the prohibition in R.C. 4928.38 because there is an irreconcilable conflict between that section and the later-enacted R.C.

4928.143(B)(2)(d). Reply Memorandum in Support of the Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider at 9-16 (May 13, 2016) (“DP&L Reply”).

In defense of a similar rider, the Service Stability Rider (“SSR”), DP&L advanced these same claims to the Supreme Court of Ohio. On June 20, 2016, the Court reversed the Commission’s authorization of the SSR. Because the claims DP&L has presented to support the authorization of an SSR-E rate increase were squarely presented to the Court and rejected, the Court’s decision disposes of DP&L’s claims that the Commission may ignore the prohibition of transition revenue or its equivalent contained in R.C. 4928.38. Accordingly, the Commission should deny DP&L’s Motion to increase the SSR-E rate.

II. ARGUMENT

The Commission issued its Opinion and Order approving the current electric security plan (“ESP”) for DP&L on September 4, 2013 and modified that order through an Entry Nunc Pro Tunc on September 6, 2013. *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 Nos. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept. 4, 2013) and Entry Nunc Pro Tunc (Sept. 6, 2013). As a term of the ESP, the Commission authorized the SSR (with a term that ended on December 31, 2016) and the SSR-E. Opinion and Order at 17-28; Entry Nunc Pro Tunc at 2. The Commission set the rate of the SSR-E at zero and required DP&L to file an application and meet several conditions if it sought to increase the rate of the SSR-E on or after January 1, 2017. Opinion and Order at 26-28; Entry Nunc Pro Tunc at 2.

IEU-Ohio and the Office of the Ohio Consumers' Counsel ("OCC") sought rehearing of the Opinion and Order. After the Commission issued its final entry on rehearing and refused to suspend its authorization of the SSR, IEU-Ohio and OCC filed notices of appeal to the Supreme Court of Ohio. See, e.g., Notice of Appeal of Industrial Energy Users-Ohio, Sup. Ct. Case No. 2014-1505 (Aug. 29, 2014).

While the appeal of the SSR was pending, DP&L filed an application for approval of a new ESP. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 16-395-EL-SSO, et al., Application (Feb. 22, 2016) ("DP&L ESP III"). In the DP&L ESP III case on March 30, 2016, DP&L filed a motion seeking to increase the rate of the SSR-E and asserted that it had satisfied the conditions that the Commission had established for implementation of an SSR-E rate increase. Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider (Mar. 30, 2016) ("DP&L Motion").

On April 21, 2016, the Supreme Court of Ohio issued a decision reversing the Commission's authorization of the receipt of transition revenue through a stability rider. In that decision, the Court held that the Commission had violated R.C. 4928.38 when it authorized the billing and collection of transition revenue or its equivalent by the Ohio Power Company ("AEP-Ohio") under the guise of R.C. 4928.143(B)(2)(d). *In re Application of Columbus Southern Power Co.*, Slip Op. 2016-Ohio-1608, ¶¶ 12-40 (Apr. 21, 2016) ("CSP").

On April 29, 2016,¹ IEU-Ohio filed its memorandum opposing the DP&L Motion to increase the rate of the SSR-E. Industrial Energy Users-Ohio's Memorandum Contra

¹ In response to a motion by another intervenor, the Commission extended the deadline to file a memorandum contra from April 14 to April 29, 2016. Entry (Apr. 11, 2016).

the Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider at 6-15 (Apr. 29, 2016) (“IEU-Ohio Memo Contra”). In the Memorandum Contra, IEU-Ohio demonstrated that DP&L had failed to satisfy the conditions for an increase of the SSR-E rate set out in the Opinion and Order. *Id.* at 6-15. Additionally, IEU-Ohio, citing the Court’s decision in *CSP*, argued that authorization of the rate increase would trigger a violation of R.C. 4928.38 because it would permit DP&L to bill and collect transition revenue or its equivalent. *Id.* at 18-20.

DP&L filed a reply to IEU-Ohio’s Memo Contra on May 13, 2016.² In that reply, DP&L argued in part that the Commission should not rely on the Court’s decision in *CSP* to deny the request for an SSR-E rate increase because DP&L was seeking a “stability” charge permitted by R.C. 4928.143(B)(2)(d). DP&L Reply at 9-10. Further, it asserted that the Court had not addressed its argument that the Commission could authorize the recovery of transition revenue under R.C. 4928.143(B)(2)(d) under alternative claims. These alternative claims were that (1) the Commission could authorize DP&L to bill and collect transition revenue or its equivalent under R.C. 4928.143(B)(2)(d) because the “notwithstanding” clause of R.C. 4928.143(B)(2) permitted the Commission to ignore the prohibition in R.C. 4928.38, and (2) the Commission could ignore the prohibition in 4928.38 because there was an irreconcilable conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38 that required the former section to be enforced. *Id.* at 11-16.

After the Court issued the *CSP* decision, DP&L (with the Commission) filed with the Court a supplemental brief defending the Commission’s authorization of the SSR.

² In response to a motion by DP&L, the Commission extended the deadline for DP&L to file its reply to May 13, 2016. Entry (May 4, 2016).

In re Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, Sup. Ct. Case No. 14-1505, Supplemental Brief of Appellee the Public Utilities Commission of Ohio and Cross-Appellant the Dayton Power and Light Company Regarding Recent Supreme Court Decision (June 2, 2016). In the supplemental brief, DP&L urged the Court to find that its decision in *CSP* did not require reversal of the authorization of the SSR. Repeating claims it had previously presented in its merit briefs to the Court, DP&L argued that *CSP* was not controlling because the “notwithstanding” clause in R.C. 4928.143(B)(2) permitted the Commission to ignore the prohibition in R.C. 4928.38. *Id.* at 3-6. Additionally, DP&L argued R.C. 4928.38 irreconcilably conflicts with the subsequently enacted authority provided by R.C. 4928.143(B)(2)(d) and the conflict should be resolved in favor of the more recently enacted statute. *Id.* at 6-9.

IEU-Ohio and OCC filed supplemental briefs responding to DP&L and demonstrated that R.C. 4928.143 does not authorize the collection of transition revenue or its equivalent and that the interpretation of the Commission’s statutory authority advanced by DP&L under R.C. 4928.143 and 4928.38 violated legislative intent and the Commission’s application of the statutes. See *In re Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Sup. Ct. Case No. 14-1505, Supplemental Brief of Appellant/Cross Appellee Industrial Energy Users-Ohio (June 6, 2016) and Supplemental Brief by Appellant the Office of the Ohio Consumers’ Counsel (June 7, 2016). Those arguments, set out below, also dispose of DP&L’s assertion that the Commission can authorize an increase in the SSR-E.

A. Receipt of transition revenue or its equivalent cannot be authorized under R.C. 4928.143(B)(2)(d)

In asserting that the Commission can authorize the SSR-E to bill and collect transition revenue or its equivalent, DP&L assumes that the Commission can authorize under R.C. 4928.143(B)(2)(d) the collection of transition revenue or its equivalent. As the Court has already held, that claim is incorrect. *CSP*, at ¶¶ 14-40.

The terms that may be approved as part of an ESP are limited to those provided by R.C. 4928.143(B)(2). *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). R.C. 4928.143(B)(2)(d) provides that an ESP may contain “terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.” This language does not authorize the billing and collection of lost generation revenue or transition revenue designed to maintain the financial integrity of an electric utility’s retail generation business. Accordingly, the premise of DP&L’s argument relying on R.C. 4928.143(B)(2)(d) is wrong.

B. The claim that the Commission may authorize the recovery of transition revenue or its equivalent under R.C. 4928.143 notwithstanding the prohibition in R.C. 4928.38 and 4928.141 should be rejected because it is not supported by legislative intent or the Commission’s prior, simultaneous, and subsequent interpretation and application of the regulatory structure applicable to electric distribution utilities.

To avoid the prohibition on the authorization of transition revenue under R.C. 4928.38, DP&L claims that the “notwithstanding” clause found in R.C. 4928.143(B)(2) permits the Commission to authorize an increase in the SSR-E even if the authorization would permit DP&L to bill and collect transition revenue. DP&L Reply at 12. That claim is without merit.

The “paramount concern in construing a statute is legislative intent.” *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 22. “Notwithstanding” clauses such as that contained in R.C. 4928.143(B)(2) therefore must be read in light of the “paramount concern” of the legislation. *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (*quoting State v. Cook*, 83 Ohio St.3d 404, (1998)) (“A cardinal rule of statutory interpretation is that ‘[a] court must look to the language and purpose of the statute in order to determine legislative intent.’”); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (2010); *Yates v. U.S.*, 574 U.S. ___, 2015 WL 773330 at *6 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (term “tangible object” in Sarbanes-Oxley Act did not include fish because “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.”)).

In this instance, the “notwithstanding” clause in R.C. 4928.143(B)(2) must be read in light of the enactment in the same legislation of R.C. 4928.141, which prohibits an allowance for transition costs, and other provisions that render the SSR charge unlawful.

As part of Amended Substitute Senate Bill 221 (“SB 221”), the legislation enacting R.C. 4928.143 and its “notwithstanding” clause, the General Assembly also enacted R.C. 4928.141. That Section specifies that an electric utility must maintain a standard service offer and that this offer may take the form of a Market Rate Offer under R.C. 4928.142 or an ESP under R.C. 4928.143. R.C. 4928.141 also addresses the previously enacted prohibition on transition revenue and directs the Commission to

exclude an allowance for transition costs from any standard service offer. As the Court recently explained, R.C. 4928.141 “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.” *CSP*, ¶ 17.

In SB 221, the General Assembly provided additional direction that it did not intend the “notwithstanding” clause to subsume all of the other statutory provisions in Title 49. In particular, the General Assembly modified the state energy policy by amending and renumbering R.C. 4928.02(H) to provide that it is the policy of the State of Ohio to:

Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.* (Emphasis on the additional statutory language).³

The amendment specifically prohibits a charge such as the SSR-E that provides DP&L’s generation business with additional revenue through a distribution-like, *i.e.*, nonbypassable, charge.

In addition to prohibiting an allowance for transition costs in R.C. 4928.141 and prohibiting nonbypassable generation-related charges, the General Assembly also modified R.C. 4928.17. Under then-existing and current law, this Section requires an electric utility to separate its competitive generation function from the noncompetitive distribution and transmission functions and prohibits the utility from providing any undue

³ Prior to SB 221, the statutory section was numbered as division (G) and provided that it is the State’s policy to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.” *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48; see also Ohio General Assembly Archives, SB 221, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

preference or advantage to its competitive generation business unit or the generation business of any affiliate. In SB 221, the General Assembly added a requirement that electric utilities obtain Commission approval prior to divesting any generation assets. Thus, while the General Assembly enacted the “notwithstanding” clause, it also continued the prohibition on a utility’s provision of an undue advantage or preference to its own competitive generation business.

While the General Assembly has amended Chapter 4928 several times since it enacted R.C. 4928.38 prohibiting the authorization of transition revenue,⁴ it has not repealed or given any signal that the one-time opportunity to collect transition revenue or its equivalent was silently repealed or should be ignored. When it has addressed the issue at all, the General Assembly has enacted amendments that bar transition revenue, retain the bar on undue subsidies, and prohibit nonbypassable generation related charges. As the Ohio law currently stands, therefore, an electric utility was afforded one opportunity to bill and collect transition revenue, and that opportunity is long over. R.C. 4928.38 to R.C. 4928.40; *CSP*, at ¶¶ 15-17.

Furthermore, the Commission’s decisions bear out the Commission’s understanding that R.C. 4928.143(B)(2) did not silently repeal various other requirements of Chapter 4928. In the Opinion and Order authorizing the SSR, for example, the Commission rejected another nonbypassable charge proposed by DP&L under R.C. 4928.143(B)(2)(d), the Switching Tracker, because it “violates the policies of

⁴ When enacting SB 221, the General Assembly also did not repeal R.C. 4928.06 which obligates the Commission to effectuate the state energy policy contained in R.C. 4928.02. In 2012, the General Assembly subsequently made additional changes to the state energy policy specified in R.C. 4928.02. See Senate Bill 315 (these additional changes did not alter the prohibition in R.C. 4928.02(H)). Therefore, the General Assembly intends that the state energy policy continue to have effect when the Commission reviews and approves an application for an ESP.

the state of Ohio [R.C. 4928.02], is anticompetitive, and would discourage further development of Ohio's retail electric services market." *DP&L II*, Opinion and Order at 30.

The interpretation of the "notwithstanding" clause advanced by DP&L is also inconsistent with prior Commission orders. In 2010, for example, AEP-Ohio requested that the Commission authorize a charge under R.C. 4928.143(B)(2)(c) and (d) to allow it to collect costs associated with closing a generation plant. *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 7, 17-18 (Jan. 11, 2012). The Commission rejected AEP-Ohio's application, finding that it did not have the authority under R.C. 4928.143(B)(2) to allow for such recovery *and* that the recovery of such costs was prohibited by R.C. 4928.02(H). *Id.*

Subsequent to issuing the orders authorizing the SSR-E, the Commission issued a decision that again confirms that the State policy in R.C. 4928.02 applies to charges authorized under R.C. 4928.143(B)(2). *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 7, 26, 65, 69, 91, 95 (Feb. 25, 2015) (reviewing various terms in light of state energy policy). In this order, the Commission held that it was required to modify a rider proposed by AEP-Ohio under R.C. 4928.143(B)(2) because the proposed rider would violate the prohibition in R.C. 4928.02(H). *Id.* at 81. The Commission further held in this order that an additional statutory requirement contained in R.C.

4928.10(D)(3) could not be ignored when authorizing a charge under R.C. 4928.143(B)(2). *Id.* at 82.

In summary, the General Assembly did not intend to give the Commission *carte blanche* to ignore every other statute in Title 49 when authorizing charges under an ESP when it enacted the “notwithstanding” clause in R.C. 4928.143(B)(2). The General Assembly’s simultaneous and subsequent amendments of Chapter 4928 reflect an intent to maintain the applicability of the prohibitions in R.C. 4928.02(H), 4928.141, 4928.17, and 4928.38. Further, the Commission’s own interpretation of R.C. 4928.143(B)(2)(d) evidences that the Commission itself does not interpret the “notwithstanding” clause in such a way that the Commission may ignore the prohibitions contained in other provisions of Chapter 4928. Thus, the claim that the Commission may ignore R.C. 4928.38 and authorize DP&L to bill and collect transition revenue or its equivalent through an increase of the SSR-E rate finds no support in the law or the Commission’s application of the law.

C. The claim that the Commission may authorize transition revenue or its equivalent by resolving an alleged conflict under R.C. 1.52 should be rejected because there is no conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38

In an alternative claim, DP&L asserts that the Commission should ignore the prohibition in R.C. 4928.38 because R.C. 4928.143 was enacted after R.C. 4928.38. DP&L Reply at 14-16. This claim is premised on Section R.C. 1.52 and is applicable only if two statutes are irreconcilable. R.C. 4928.143(B)(2)(d), however, is irreconcilable with R.C. 4928.141 and 4928.38 only if words are inserted into R.C. 4928.143(B)(2)(d) that would allow the Commission to authorize transition revenue or its equivalent. The Commission, however, is not authorized to expand the terms and conditions that may

be included in an ESP, and the contemporaneous enactment of other provision prohibiting the billing and collection of transition revenue or equivalent demonstrate that the General Assembly did not intend to lift the prohibition of the authorization of transition revenue or its equivalent.

“It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom.” *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948); *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E. 2d 8 (1969) (In matters of construction, “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.”). As noted above, the Commission is likewise bound to limit the terms that may be approved as part of an ESP to those provided by R.C. 4928.143(B)(2). *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). Under R.C. 4928.143(B)(2)(d), there is no provision for an allowance for transition revenue or its equivalent. Because R.C. 4928.143(B)(2)(d) does not authorize the recovery of transition revenue or its equivalent, there is no “irreconcilable conflict” with R.C. 4928.38. Therefore, the rule of statutory construction favoring later enacted statutes if there is an irreconcilable conflict is not applicable.

Moreover, the interpretative rule does not apply due to the enactment of R.C. 4928.02(H) and 4928.141 in the same legislation with R.C. 4928.143. The premise of R.C. 1.52 is that the General Assembly intended to limit or repeal the prior statute when it enacted the subsequent law that irreconcilably conflicts with the prior law. When the General Assembly enacted R.C. 4928.143(B)(2) in SB 221, however, it also enacted R.C. 4928.141 prohibiting an allowance of transition costs and amended R.C.

4928.02(H) to prohibit nonbypassable collection of generation costs. Based on the General Assembly's enactment of R.C. 4928.02(H) and 4928.141 in the same legislation as the provision authorizing "stability" riders, it is evident that the General Assembly did not intend to repeal the prohibition of the receipt of transition revenue or its equivalent. R.C. 1.52 does not require a different result.

D. The Commission should reject DP&L's alternative claims that the Commission may ignore R.C. 4928.38 based on the Supreme Court's summary reversal of the authorization of the SSR

Any doubt about the vitality of DP&L's alternative claims supporting an increase in the SSR-E has now been laid to rest by the Court's decision reversing the authorization of the SSR. In that case as noted above, DP&L (with the Commission) presented the alternative claims that DP&L is relying upon to justify the increase in the SSR-E rate. In its decision, the Court summarily reversed the authorization of the SSR in a single sentence: "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.2d __." *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3431, Decision (June 20, 2016) ("DP&L"). The Court's decision thus disposes of DP&L's alternative claims that the Commission may ignore the prohibition of transition revenue or its equivalent based on either the "notwithstanding" clause or due to an irreconcilable conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38.

III. CONCLUSION

As IEU-Ohio demonstrated in its Memo Contra, DP&L's motion seeking an increase in the SSR-E rate would authorize the recovery of transition revenue or its equivalent in violation of R.C. 4928.38. IEU-Ohio Memorandum Contra at 18-20. DP&L

has responded that the Commission may ignore the prohibition on the receipt of transition revenue or its equivalent based on the same claims it presented to the Court to support the authorization of the SSR. The Court, however, rejected those claims and has now held twice that the Commission cannot authorize an electric distribution utility to bill and collect transition revenue or its equivalent under the guise of R.C. 4928.143(B)(2)(d). Based on the Court's decisions in the *CSP* and *DP&L* cases, therefore, the Commission should reject DP&L's argument that the Commission can ignore the prohibition contained in R.C. 4928.38 and deny DP&L's Motion to increase the SSR-E rate.

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 *Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 11th day of July 2016, *via* electronic transmission.

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Summary: Reply Surreply of Industrial Energy Users-Ohio Opposing the Motion of the Dayton Power and Light Company to Implement the SSR Extension electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio