

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM
	:	

**MOTION OF THE DAYTON POWER AND LIGHT COMPANY FOR LEAVE TO FILE
A SUR-REBUTTAL IN RESPONSE TO THE SURREPLY OF
INDUSTRIAL ENERGY USERS-OHIO REGARDING THE SSR EXTENSION RIDER**

Pursuant to Ohio Admin. Code § 4901-1-12, The Dayton Power and Light Company ("DP&L") moves for leave to file a Sur-Rebuttal¹ in response to the July 11, 2016 Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension ("Surreply"). The Commission found good cause for Industrial Energy Users-Ohio ("IEU") to file its Surreply in light of the Supreme Court of Ohio's recent decision in In re Dayton Power and Light Co., Slip Opinion No. 2016-Ohio-3490. July 11, 2016 Entry, ¶13. There is equally good cause for DP&L to file a Sur-Rebuttal, both to prevent prejudice and to ensure that the Commission is fully informed of the issues before it.

IEU has stated that "it has no objection to an order permitting DP&L to file a response to [its] Surreply" June 28, 2016 Motion of Industrial Energy Users-Ohio for an

¹ A copy of the Sur-Rebuttal of The Dayton Power and Light Company to the Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension ("Sur-Rebuttal") is attached as Exhibit A.

Order Permitting It to File a Surreply Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension, p. 3.

Therefore, the Commission should grant leave for DP&L to file the Sur-Rebuttal, and treat it as filed and served as of the date of the Commission's order granting this Motion.

Respectfully submitted,

/s/ Charles J. Faruki

Charles J. Faruki (0010417)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

Jeffrey S. Sharkey (0067892)

FARUKI IRELAND & COX P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3705

Telecopier: (937) 227-3717

Email: cfaruki@ficlaw.com

djireland@ficlaw.com

jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

**MEMORANDUM IN SUPPORT OF MOTION OF THE
DAYTON POWER AND LIGHT COMPANY FOR LEAVE TO FILE A
SUR-REBUTTAL IN RESPONSE TO THE SURREPLY OF
INDUSTRIAL ENERGY USERS-OHIO REGARDING THE SSR EXTENSION RIDER**

Earlier this week, the Commission granted leave for Industrial Energy Users-Ohio ("IEU") to file a Surreply,² which further opposes the March 30, 2016 Motion of The Dayton Power and Light Company ("DP&L") to Implement the SSR Extension Rider ("Motion to Implement the SSR-E"). IEU argued that there was good cause to file its Surreply both to prevent prejudice and to ensure that the Commission is fully informed of the issues before it. June 28, 2016 Motion of Industrial Energy Users-Ohio for an Order Permitting It to File a Surreply Opposing The Dayton Power and Light Company to Implement the SSR Extension, p. 3-4. The Commission found good cause for IEU to file its Surreply in light of the Supreme Court of Ohio's recent decision in the appeals from Case No. 12-426-EL-SSO.³ July 11, 2016 Entry, ¶11-13 (citing In re Dayton Power and Light Co., Slip Opinion No. 2016-Ohio-3490).

Likewise, the Commission similarly should find good cause for DP&L to file a Sur-Rebuttal⁴ in response to the Surreply. The Supreme Court's decision in In re Dayton Power and Light Co. was issued on June 20, 2016, more than a month after briefing concluded on DP&L's Motion to Implement the SSR-E. See May 13, 2016 Reply Memorandum in Support of the Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider.

² July 11, 2016 Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension ("Surreply").

³ In the Matter of the Application of The Dayton Power and Light Co. for Approval of its Electric Security Plan, et al., Case Nos. 12-426-EL-SSO, et al.

⁴ A copy of the Sur-Rebuttal of The Dayton Power and Light Company to the Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension ("Sur-Rebuttal") is attached as Exhibit A.

The Commission should provide DP&L with an equal opportunity to address the impact of the Court's decision on the Motion to Implement the SSR-E, and thereby prevent prejudice and ensure that the Commission is fully informed of the issues before it. Oct. 12, 2011 Entry, p. 13 In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services and LDMI TeleCommunications, Inc. v. AT&T Ohio, Case No. 11-3407-TP-CSS (motion for surreply granted "[s]o that the Commission will be more fully advised"); Nov. 10, 2004 Opinion and Order, p. 22 In the Matter of the Complaint of Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio (now known as SBC Ohio), Case No. 02-796-TP-CSS (motion to file surreply granted "[t]o avoid prejudice . . and to allow for a complete discussion of the issue").

Moreover, IEU has stated that "it has no objection to an order permitting DP&L to file a response to [its] Surreply" June 28, 2016 Motion of Industrial Energy Users-Ohio for an Order Permitting It to File a Surreply Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension, p. 3.

For the foregoing reasons, the Commission should grant leave for DP&L to file the attached Sur-Rebuttal, and treat it as filed and served as of the date of the Commission's order granting this Motion.

Respectfully submitted,

/s/ Charles J. Faruki

Charles J. Faruki (0010417)

(Counsel of Record)

D. Jeffrey Ireland (0010443)

Jeffrey S. Sharkey (0067892)

FARUKI IRELAND & COX P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3705

Telecopier: (937) 227-3717

Email: cfaruki@ficlaw.com

djireland@ficlaw.com

jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of The Dayton Power and Light Company for Leave to File a Sur-Rebuttal in Response to the Surreply of Industrial Energy Users-Ohio Regarding the SSR Extension Rider has been served via electronic mail upon the following counsel of record, this 13th day of July, 2016:

Thomas McNamee
Natalia Messenger
Public Utilities Commission of Ohio
30 East Broad Street, 16th Floor
Columbus, OH 43215-3793
Email:
thomas.mcnamee@ohioattorneygeneral.gov
natalia.messenger@ohioattorneygeneral.gov

Attorneys for PUCO Staff

Kimberly W. Bojko
Danielle M. Ghiloni
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: bojko@carpenterlipps.com
ghiloni@carpenterlipps.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
Email: schmidt@sppgrp.com

Attorney for The Energy Professionals of Ohio

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
Email: fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users – Ohio

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com

Attorneys for The Ohio Energy Group

Joseph Olikier (Counsel of Record)
Matthew White
Evan Betterton
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Email: joliker@igsenergy.com
mwhite@igsenergy.com
Ebetterton@igsenergy.com

Attorney for IGS Energy

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Email: jeffrey.mayes@monitoringanalytics.com

Evelyn R. Robinson
PJM Interconnection, LLC
2750 Monroe Blvd
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorneys for Monitoring Analytics, LLC as
The Independent Market Monitor for PJM

Trent Dougherty (Counsel of Record)
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: tdougherty@the OEC.org

Attorney for the Ohio Environmental
Council and Environmental Defense Fund

William J. Michael (Counsel of Record)
Kevin F. Moore
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Email: william.michael@occ.ohio.gov
kevin.more@occ.ohio.gov

Attorneys for the Ohio Consumers' Counsel

Michael D. Dortch
Richard R. Parsons
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
Email: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for Noble Americas
Energy Solutions LLC

Joel E. Sechler (Counsel of Record)
Carpenter Lipps & Leland
280 N. High St., Suite 1300
Columbus, OH 43215
Email: sechler@carpenterlipps.com

Gregory J. Poulos
EnerNOC, Inc.
P.O. Box 29492
Columbus, OH 43229
Email: gpoulos@enernoc.com

Attorneys for EnerNOC, Inc.

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

Attorney for The Kroger Co.

Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Email: cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

Madeline Fleisher
Kristin Field
Environmental Law & Policy Center
21 West Broad Street, Suite 500
Columbus, OH 43215
Email: mfleisher@elpc.org
kfield@elpc.org

Attorneys for The Environmental Law &
Policy Center

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Calfee, Halter & Griswold LLP
41 South High Street
1200 Huntington Center
Columbus, OH 43215
Email: slesser@calfee.com
jlang@calfee.com
talexander@calfee.com

Attorneys for The City of Dayton and
Honda of America Mfg., Inc.

Michael J. Settineri
Stephen M. Howard
Gretchen L. Petrucci
Ilya Batikov
William A. Sieck
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
Email: mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
wasieck@vorys.com

Attorneys for Dynegy Inc.,
PJM Power Providers Group, and
Retail Energy Supply Association

Michelle Grant
Dynegy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
Email: michelle.d.grant@dynegy.com

Attorneys for Dynegy Inc.

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
Email: gthomas@gtpowergroup.com

Richard C. Sahli
Richard C. Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
Email: rsahli@columbus.rr.com

Tony G. Mendoza, Staff Attorney (pro hac vice)
Sierra Club Environmental Law Program
2101 Webster Street, 13th Floor
Oakland, CA 94612
Email: tony.mendoza@sierraclub.org

Attorneys for Sierra Club

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, WV 26003
Email: lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
P.O. Box 90
Roanoke, VA 24002-0090
Email: charris@spilmanlaw.com

Steve W. Chriss
Senior Manager, Energy Regulatory Analysis
Greg Tillman
Senior Manager, Energy Regulatory Analysis
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Email: Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com

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

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th Floor
Washington, DC
Email: stheodore@epsa.org

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

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

Attorney for Edgemont Neighborhood Coalition

Amy B. Spiller
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

John R. Doll
Matthew T. Crawford
Doll, Jansen & Ford
111 West First Street, Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com
mcrawford@djflawfirm.com

Attorneys for Utility Workers of
America Local 175

Evelyn R. Robinson
2750 Monroe Boulevard
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorney for PJM Interconnection, L.L.C.

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Email: rick.sites@ohiohospitals.org

Matthew W. Warnock
Dylan F. Borchers
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: mwarnock@bricker.com
dborchers@bricker.com

Attorneys for The Ohio Hospital Association

Terrence N. O'Donnell
Raymond D. Seiler
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: todollell@dickinsonwright.com
rseiler@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

Devin D. Parram
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, OH 43215
Email: dparram@taftlaw.com

Attorney for People Working
Cooperatively, Inc.

/s/ Jeffrey S. Sharkey
Jeffrey S. Sharkey

EXHIBIT A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM
	:	

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

Charles J. Faruki (0010417)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com
djireland@ficlaw.com
jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. THE SUPREME COURT OF OHIO HAS NOT DECIDED TWO SIGNIFICANT ISSUES OF STATUTORY INTERPRETATION FOR CHARGES AUTHORIZED PURSUANT TO § 4928.143(B)(2)(d).....	1
III. THE SSR-E IS LAWFUL "NOTWITHSTANDING ANY OTHER PROVISION OF TITLE [49]"	3
IV. SECTION 4928.38 DOES NOT LIMIT THE LATER-ENACTED SECTION 4928.143(B)(2)(d).....	6
A. The Later-Enacted Statute Controls	6
B. Section 4928.141(A) Does Not Bar the Recovery of "Equivalent" Charges	6
V. CONCLUSION	9

I. INTRODUCTION AND SUMMARY

The Supreme Court of Ohio recently reversed the Commission's decision in Case No. 12-426-EL-SSO.¹ In re Application of Dayton Power and Light Co., Slip Opinion No. 2016-Ohio-3490 ("In re DP&L"). However, the Court did not address two significant issues of statutory interpretation, which separately and independently demonstrate that the SSR-E is lawful. First, the "[n]otwithstanding" clause of § 4928.143(B) negates any prohibition against the collection of "transition revenues or any equivalent revenues" under § 4928.38 and "transition costs" under § 4928.141(A). Second, as the later-enacted statute, § 4928.143(B)(2)(d) is not limited by § 4928.38. In deciding whether DP&L may implement the SSR-E, the Commission can and should reach these issues.

II. THE SUPREME COURT OF OHIO HAS NOT DECIDED TWO SIGNIFICANT ISSUES OF STATUTORY INTERPRETATION FOR CHARGES AUTHORIZED PURSUANT TO § 4928.143(B)(2)(d)

As the Commission is well-aware, the Ohio General Assembly deregulated the generation market in 1999, but partially re-regulated the market in 2008. Specifically, in 1999, the General Assembly required electric distribution utilities to charge their customers a "market based" rate² and permitted limited recovery of transition costs.³

In 2008, Am.Sub.S.B. 221 repealed the section requiring utilities to charge a market based rate, and instead required utilities to charge rates set through a Market Rate Offer or an Electric Security Plan ("ESP"). Ohio Rev. Code §§ 4928.141, 4928.142, and 4928.143.

¹ In the Matter of the Application of The Dayton Power and Light Co. for Approval of its Electric Security Plan, et al., Case Nos. 12-426-EL-SSO, et al. ("DP&L ESP II").

² Ohio Consumers' Counsel v. Pub. Util. Comm., 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶15, quoting prior version of Ohio Rev. Code § 4928.14(A).

³ Ohio Rev. Code §§ 4928.37 through 4928.40.

Critically, as part of an ESP, a utility was authorized to recover a charge that would allow the utility to provide stable and certain "retail electric service." Ohio Rev. Code § 4928.143(B)(2)(d). The term "retail electric service" is defined to include generation service. Ohio Rev. Code § 4928.01(A)(27). Section 4928.143(B)(2)(d) thus authorized the Commission to approve charges that will lead to stable generation service in the future.

The Supreme Court recently ruled that AEP's RSR – "a charge that relates to default service, promotes stable retail-electric-service prices, and ensures customer certainty regarding retail electric service" – was lawful under § 4928.143(B)(2)(d).⁴ In re Application of Columbus S. Power Co., ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___, ¶¶43-59 ("In re AEP"). However, the Court went on to rule that the RSR was barred by § 4928.38 because "AEP is receiving the equivalent of transition revenues through that rider." Id. at ¶¶14-40. In reaching that decision, three justices declined to address whether the "[n]otwithstanding" clause of § 4928.143(B)(2) negates the applicability of § 4928.38 "because the commission did not rely on this language in the case below, and no party appears to have raised the issue." Id. at ¶¶38, n.3 (Kennedy, O'Donnell, and French, JJ.). The Chief Justice and another justice would have had the Commission address that issue on remand. Id. at ¶79 (O'Connor, C.J. and Lanzinger, J.). The remaining justices were silent on that issue. Id. at ¶80 (Pfeifer and O'Neill, JJ.). In addition, none of the parties raised – and none of the justices addressed – whether § 4928.38 limits the later-enacted § 4928.143(B)(2)(d). Thus, those two issues of statutory interpretation were not decided by a single justice.

⁴ This holding, as well as the Commission's decision in DP&L ESP II forecloses IEU's contention (pp.5-6) that the SSR-E does not satisfy the requirements of Ohio Rev. Code § 4928.143(B)(2)(d).

Following the Court's decision in In re AEP, the Commission and DP&L raised the "[n]otwithstanding" clause and later-enacted-statute arguments in the appeal from DP&L ESP II. June 2, 2016 Supplemental Brief of Appellee The Public Utilities Commission of Ohio and Cross-Appellant The Dayton Power and Light Company Regarding Recent Supreme Court Decision, pp. 3-9, Ohio S. Ct. Case No. 2014-1505. In response, IEU argued that neither argument was "properly before the Court" because the Commission did not expressly rely on either argument in support of its decision authorizing the SSR. June 6, 2016 Supplemental Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio, Ohio S. Ct. Case No. 2014-1505, pp. 4-5.

The Court later ruled – without elaboration – that "[t]he decision of the Public Utilities Commission is reversed on the authority of [In re AEP]." In re DP&L, ¶1. Again, the Court did not address whether (1) the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of §§ 4928.38 and 4928.141(A), and (2) § 4928.38 can control the later-enacted § 4928.143(B)(2)(d). Thus, they remain open questions.

III. THE SSR-E IS LAWFUL "NOTWITHSTANDING ANY OTHER PROVISION OF TITLE [49]"

In its Opinion and Order in DP&L ESP II, the Commission approved DP&L's SSR and SSR-E pursuant to Ohio Rev. Code § 4928.143(B)(2)(d). The statute states:

"(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

* * *

(2) The plan may provide for or include, without limitation, any of the following:

* * *

(d) 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[.]"

(Emphasis added.)

Thus, the "[n]otwithstanding" clause of § 4928.143(B) establishes that the SSR-E is lawful even if the Supreme Court were to conclude that the SSR-E constitutes a transition charge or its equivalent. Specifically, the sections of the Revised Code that bar the recovery of transition costs are §§ 4928.141(A) and 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause.

The Supreme Court interprets "notwithstanding" clauses broadly, holding that they "indicate[] the General Assembly's intention" that a given provision "take[s] precedence over any contrary statute purporting to limit" that provision. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶35 (emphasis added). Accord: Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18, 113 S.Ct. 1898 (1993) ("a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.") (emphasis added).

In its Surreply, IEU asks the Commission (pp. 6-11) to ignore the "notwithstanding" clause of § 4928.143(B) and find that the General Assembly did not mean what it plainly and unambiguously said. However, as IEU later concedes (p. 12), "[i]t 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." Wachendorft v. Shaver, 149

Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948). Indeed, "[t]he question is not what the General Assembly intended to enact but the meaning of that which it did enact." Ohio Neighborhood at ¶35 (emphasis added). The Commission cannot ignore the plain and unambiguous language of § 4928.143(B) in deciding whether the SSR-E is lawful. State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶9 ("An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.").

IEU also argues (p. 13) that the Supreme Court's recent decisions preclude any argument that the SSR-E is lawful "notwithstanding" any prohibition against transition revenue or its equivalent. However, as shown in the preceding section, not a single justice decided the "[n]otwithstanding" clause issue in either In re AEP or In re DP&L. IEU even argued that the Court could not reach that issue because the issue was not properly before it. June 6, 2016 Supplemental Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio, Ohio S. Ct. Case No. 2014-1505, pp. 4-5. It is disingenuous for IEU to argue that the Court actually decided that issue in its one-sentence opinion, which both (a) failed to mention the issue, and (b) followed In re AEP, which expressly declined to address the issue. In re DP&L, ¶1; In re AEP, ¶¶38, n.3, 79, and 80.

Since the Supreme Court did not decide whether the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of §§ 4928.38 and 4928.141(A), the Commission can and should follow the plain and unambiguous language of § 4928.143(B) and conclude that the SSR-E is lawful, even if it were to collect transition revenue or its equivalent.

IV. SECTION 4928.38 DOES NOT LIMIT THE LATER-ENACTED SECTION 4928.143(B)(2)(d)

A. The Later-Enacted Statute Controls

There is a separate and independent reason that the SSR-E does not violate the prohibition (passed in 1999) in § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the Commission authorized the SSR-E pursuant to § 4928.143(B)(2)(d). That section was included in Am.Sub.S.B. 221, which was passed in 2008, years after the transition costs statute was enacted.

Section 4928.143(B)(2)(d) was enacted after § 4928.38; therefore, a stability charge approved under § 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge under § 4928.38. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

B. Section 4928.141(A) Does Not Bar the Recovery of "Equivalent" Charges

In its Opinion in In re AEP, the Supreme Court noted that § 4928.141(A), which was also included in Am.Sub.S.B. 221 (i.e., at the same time as § 4928.143(B)(2)(d)), includes a prohibition against the recovery of "previously authorized allowances for transition costs." In re AEP, 2016-Ohio-1608, at ¶17 (quoting § 4928.141(A)). That section does not change the analysis in the immediately preceding section of this Sur-Rebuttal because the term "transition cost" is defined by statute, and DP&L's SSR-E does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). Ohio Rev. Code § 4928.39(A) ("The costs were prudently incurred.") (emphasis added); § 4928.39(B) ("The costs

are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); In re AEP, 2016-Ohio-1608, at ¶22.

In contrast, DP&L's SSR was set at an amount to allow DP&L to provide stable retail electric service in the future. Sept. 4, 2013 Opinion and Order, pp. 21-22, 25-26, DP&L ESP II. The SSR amount was set based upon forecasts of DP&L's future revenues and expenses. Mar. 19, 2014 Second Entry on Rehearing, pp. 9-10, DP&L ESP II. Therefore, the SSR – and by extension, the SSR-E – do not recover "transition costs," as defined by statute, because they are forward-looking.

AEP's RSR also was based on projections of future revenues and expenses. In re AEP, 2016-Ohio-1608, at ¶24. In its decision in the In re AEP, the Supreme Court nevertheless held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by § 4928.38. Id. at ¶25. As demonstrated in the immediately-preceding section of this Sur-Rebuttal, the statutory bar against recovering the "equivalent" of transition costs in § 4928.38 should not bar DP&L's recovery of the SSR-E, because § 4928.143(B)(2)(d) is the later-enacted statute.

Section 4928.141(A) does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, § 4928.141(A) bars the recovery only of "transition costs." Since the SSR-E is forward-looking, it does not satisfy the statutory definition of transition costs, and it is not barred by § 4928.141(A).

That conclusion – that the equivalent of transition costs can be recovered through § 4928.143(B)(2)(d), and the recovery is not barred by § 4928.141(A) – is consistent with the

structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide stable "retail electric service" (including generation service) through § 4928.143(B)(2)(d). Such a charge will necessarily be forward-looking. The General Assembly continued the prohibition against the recovery of transition costs (i.e., historic costs of constructing generation plants) in § 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in § 4928.143(B)(2)(d).

In short, the SSR-E is recoverable under § 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in § 4928.38 is inapplicable because § 4928.143(B)(2)(d) is the later-enacted statute. Further, the SSR-E is forward-looking and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in § 4928.141(A) is thus inapplicable.

As with the "notwithstanding" clause issue, IEU argues (p. 13) that the Court's recent decisions preclude any argument that the SSR-E is lawful because of the later-enacted § 4928.143(B)(2)(d). Again, however, IEU previously argued that this issue was not properly before the Supreme Court. June 6, 2016 Supplemental Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio, Ohio S. Ct. Case No. 2014-1505, pp. 4-5. IEU cannot credibly argue that the Court decided this issue in its one-sentence opinion, which (a) failed to mention the issue, and (b) followed In re AEP, which did not consider it. In re DP&L, ¶1.

Since the Supreme Court did not decide whether § 4928.38 can limit the later-enacted § 4928.143(B)(2)(d), the Commission can and should determine that the later-enacted statute controls.

V. CONCLUSION

The Commission should find that the SSR-E is lawful because: (1) the "[n]otwithstanding" clause of § 4928.143(B) negates any prohibition against the collection of "transition revenues or any equivalent revenues" under § 4928.38 and "transition costs" under § 4928.141(A), and (2) as the later-enacted statute, § 4928.143(B)(2)(d) is not limited by § 4928.38.

Moreover, for the reasons stated in the March 30, 2016 Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider, and the May 13, 2016 Reply Memorandum in Support of the Motion of The Dayton Power and Light Company to Implement the SSR Extension Rider, the Commission should allow DP&L to implement the SSR-E to the extent authorized in DP&L ESP II.

Respectfully submitted,

/s/ Charles J. Faruki

Charles J. Faruki (0010417)
(Counsel of Record)
D. Jeffrey Ireland (0010443)
Jeffrey S. Sharkey (0067892)
FARUKI IRELAND & COX P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3705
Telecopier: (937) 227-3717
Email: cfaruki@ficlaw.com
djireland@ficlaw.com
jsharkey@ficlaw.com

Attorneys for The Dayton Power
and Light Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Sur-Rebuttal of The Dayton Power and Light Company to the Surreply of Industrial Energy Users-Ohio Opposing the Motion of The Dayton Power and Light Company to Implement the SSR Extension has been served via electronic mail upon the following counsel of record, this 13th day of July, 2016:

Thomas McNamee
Natalia Messenger
Public Utilities Commission of Ohio
30 East Broad Street, 16th Floor
Columbus, OH 43215-3793
Email:
thomas.mcnamee@ohioattorneygeneral.gov
natalia.messenger@ohioattorneygeneral.gov

Attorneys for PUCO Staff

Kimberly W. Bojko
Danielle M. Ghiloni
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, OH 43215
Email: bojko@carpenterlipps.com
ghiloni@carpenterlipps.com

Attorneys for The Ohio Manufacturers'
Association Energy Group

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, OH 43215
Email: schmidt@sppgrp.com

Attorney for The Energy Professionals of Ohio

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215
Email: fdarr@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users – Ohio

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Email: dboehm@BKLLawfirm.com
mkurtz@BKLLawfirm.com
kboehm@BKLLawfirm.com
jkylercohn@BKLLawfirm.com

Attorneys for The Ohio Energy Group

Joseph Olikier (Counsel of Record)
Matthew White
Evan Betterton
IGS Energy
6100 Emerald Parkway
Dublin, OH 43016
Email: joliker@igsenergy.com
mwhite@igsenergy.com
ebetterton@igsenergy.com

Attorney for IGS Energy

Jeffrey W. Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue, Suite 160
Valley Forge Corporate Center
Eagleville, PA 19403
Email: jeffrey.mayes@monitoringanalytics.com

Evelyn R. Robinson
PJM Interconnection, LLC
2750 Monroe Blvd
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorneys for Monitoring Analytics, LLC as
The Independent Market Monitor for PJM

Trent Dougherty (Counsel of Record)
Ohio Environmental Council
1145 Chesapeake Ave., Suite 1
Columbus, OH 43212-3449
Email: tdougherty@the OEC.org

Attorney for the Ohio Environmental
Council and Environmental Defense Fund

William J. Michael (Counsel of Record)
Kevin F. Moore
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Email: william.michael@occ.ohio.gov
kevin.more@occ.ohio.gov

Attorneys for the Ohio Consumers' Counsel

Michael D. Dortch
Richard R. Parsons
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
Email: mdortch@kravitzllc.com
rparsons@kravitzllc.com

Attorneys for Noble Americas
Energy Solutions LLC

Joel E. Sechler (Counsel of Record)
Carpenter Lipps & Leland
280 N. High St., Suite 1300
Columbus, OH 43215
Email: sechler@carpenterlipps.com

Gregory J. Poulos
EnerNOC, Inc.
P.O. Box 29492
Columbus, OH 43229
Email: gpoulos@enernoc.com

Attorneys for EnerNOC, Inc.

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

Attorney for The Kroger Co.

Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
Email: cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable
Energy

Madeline Fleisher
Kristin Field
Environmental Law & Policy Center
21 West Broad Street, Suite 500
Columbus, OH 43215
Email: mfleisher@elpc.org
kfield@elpc.org

Attorneys for The Environmental Law &
Policy Center

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Calfee, Halter & Griswold LLP
41 South High Street
1200 Huntington Center
Columbus, OH 43215
Email: slesser@calfee.com
jiang@calfee.com
talAlexander@calfee.com

Attorneys for The City of Dayton and
Honda of America Mfg., Inc.

Michael J. Settineri
Stephen M. Howard
Gretchen L. Petrucci
Ilya Batikov
William A. Sieck
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215
Email: mjsettineri@vorys.com
smhoward@vorys.com
glpetrucci@vorys.com
ibatikov@vorys.com
wasiack@vorys.com

Attorneys for Dynegy Inc.,
PJM Power Providers Group, and
Retail Energy Supply Association

Michelle Grant
Dynegy Inc.
601 Travis Street, Suite 1400
Houston, TX 77002
Email: michelle.d.grant@dynegy.com

Attorneys for Dynegy Inc.

Glen Thomas
1060 First Avenue, Suite 400
King of Prussia, PA 19406
Email: gthomas@gtpowergroup.com

Richard C. Sahli
Richard C. Sahli Law Office, LLC
981 Pinewood Lane
Columbus, OH 43230-3662
Email: rsahli@columbus.rr.com

Tony G. Mendoza, Staff Attorney (pro hac vice)
Sierra Club Environmental Law Program
2101 Webster Street, 13th Floor
Oakland, CA 94612
Email: tony.mendoza@sierraclub.org

Attorneys for Sierra Club

Lisa M. Hawrot
Spilman Thomas & Battle, PLLC
Century Centre Building
1233 Main Street, Suite 4000
Wheeling, WV 26003
Email: lhawrot@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
Email: dwilliamson@spilmanlaw.com

Carrie M. Harris
Spilman Thomas & Battle, PLLC
310 First Street, Suite 1100
P.O. Box 90
Roanoke, VA 24002-0090
Email: charris@spilmanlaw.com

Steve W. Chriss
Senior Manager, Energy Regulatory Analysis
Greg Tillman
Senior Manager, Energy Regulatory Analysis
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716-0550
Email: Stephen.Chriss@walmart.com
Greg.Tillman@walmart.com

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

Sharon Theodore
Electric Power Supply Association
1401 New York Ave. NW 11th Floor
Washington, DC
Email: stheodore@epsa.org

Laura Chappelle
201 North Washington Square, Suite 910
Lansing, MI 48933
Email: laurac@chappelleconsulting.net

Attorneys for PJM Power Providers Group

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

Attorney for Edgemont Neighborhood Coalition

Amy B. Spiller
Elizabeth H. Watts
Duke-Energy Ohio, Inc.
139 East Fourth Street
1303-Main
Cincinnati, OH 45202
Email: amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

Attorneys for Duke-Energy Ohio, Inc.

John R. Doll
Matthew T. Crawford
Doll, Jansen & Ford
111 West First Street, Suite 1100
Dayton, OH 45402-1156
Email: jdoll@djflawfirm.com
mcrawford@djflawfirm.com

Attorneys for Utility Workers of
America Local 175

Evelyn R. Robinson
2750 Monroe Boulevard
Audubon, PA 19403
Email: evelyn.robinson@pjm.com

Attorney for PJM Interconnection, L.L.C.

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Email: rick.sites@ohiohospitals.org

Matthew W. Warnock
Dylan F. Borchers
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
Email: mwarnock@bricker.com
dborchers@bricker.com

Attorneys for The Ohio Hospital Association

Terrence N. O'Donnell
Raymond D. Seiler
Dickinson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Email: todollell@dickinsonwright.com
rseiler@dickinsonwright.com

Attorneys for Mid-Atlantic Renewable
Energy Coalition

Devin D. Parram
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, OH 43215
Email: dparram@taftlaw.com

Attorney 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

7/13/2016 4:13:04 PM

in

Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM

Summary: Motion Motion of the Dayton Power and Light Company for Leave to File a Sur-
Rebuttal in Response to the Surreply of Industrial Energy Users-Ohio Regarding the SSR
Extension Rider electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power
and Light Company