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August 11, 2016

Public Utilities Commission of Ohio
PUCO Docketing
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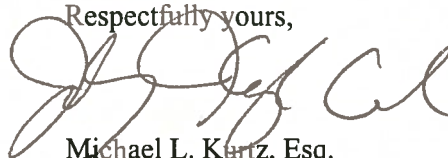
In Re: Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR

Dear Sir/Madam:

Please find attached the MEMORANDUM CONTRA MOTION TO WITHDRAW ITS APPLICATION AND MOTIONS TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES OF THE OHIO ENERGY GROUP for filing in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,



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Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

MLKkew

Cc: Certificate of Service

**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. 08-1094-EL-SSO
	:	
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-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. 08-1096-EL-AAM
	:	
	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC
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	:	
In the Matter of the Application of Dayton Power And Light Company For Approval of Its Electric Security Plan.	:	Case No. 12-426-EL-SSO
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 12-427-EL-ATA
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company For Approval of Certain Accounting Authority.	:	Case No. 12-428-EL-AAM
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company For Waiver of Certain Commission Rules.	:	Case No. 12-429-EL-WVR
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company to Establish Tariff Riders.	:	Case No. 12-672-EL-RDR
	:	

**MEMORANDUM CONTRA MOTION TO WITHDRAW ITS APPLICATION
AND MOTIONS TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES
OF THE OHIO ENERGY GROUP**

On July 27, 2016, The Dayton Power and Light Company (“DP&L” or “Company”) filed Motions (“Motions”) asking the Public Utilities Commission of Ohio (“Commission”) for permission to withdraw its currently effective Electric Security Plan (the “2016 ESP”), which was approved in Case Nos. 12-426-EL-SSO *et al*, and to reinstate the ESP approved in Case Nos. 08-1094-EL-SSO *et. al* (the “2008 ESP”) in its place. DP&L’s request to withdraw its 2016 ESP and to reinstate its 2008 ESP relies on two legal theories. Both are incorrect. Accordingly, DP&L’s Motions should be rejected outright and the Commission should: 1) direct the Company to immediately cease collection of SSR costs; and 2) refund all SSR costs paid by customers since September 4, 2013.

ARGUMENT

I. DP&L's Motions Rely Upon Incorrect Legal Theories.

A. DP&L's Claim That The Supreme Court of Ohio Reversed "*In Total*" The Commission's Decision Approving The 2016 ESP Is Wrong.

DP&L claims that a recent Supreme Court of Ohio decision reversed "*in total*" the Commission's orders approving the Company's 2016 ESP.¹ This is a gross misstatement of the Court's holding. In addressing the limited legal challenges to DP&L's 2016 ESP, the Court was concise, stating: "[t]he decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co....2016-Ohio-1608...*"² Hence, the scope of the Court's decision with respect to DP&L's 2016 ESP was limited by its findings in the *Columbus S. Power Co.* case (the "AEP Ohio ESP Appeal").

The vast majority of the Court's decision in the AEP Ohio ESP Appeal was dedicated to addressing Ohio Power Company's ("AEP Ohio") "*financial integrity*" charge – the Retail Stability Rider ("RSR").³ The Court found that a "*financial integrity*" charge such as the RSR provided the utility with "*the equivalent of transition revenue*" in violation of R.C. 4928.38.⁴ The Court reversed and remanded the part of the Commission's decision approving the RSR, ordering the Commission to determine the amount of unlawful "*transition revenue*" that AEP Ohio had collected from customers through the RSR and to refund that amount to customers on remand through an offset to its current RSR charge.⁵ The only other part of the AEP Ohio's ESP reversed and remanded to the Commission concerned the utility's significantly excessive earnings test threshold.⁶ Aside from those two components reversed by the Court, the remainder of the AEP Ohio's ESP stayed intact.

Given the limited scope of the Court's decision in the AEP Ohio ESP Appeal, the Court's citation to that case as the sole basis for its decision on DP&L's 2016 ESP can have only one meaning: that DP&L's Service Stability Rider ("SSR"), which is a "*financial integrity*" charge equivalent to AEP Ohio's RSR, similarly provides DP&L with unlawful "*transition revenue*" and is therefore barred by R.C. 4928.38. But no aspect of the

¹ See *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016).

² *Id.* (emphasis added).

³ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608.

⁴ *Id.* at ¶25.

⁵ *Id.* at ¶40.

⁶ *Id.* at ¶66.

Court's limited AEP Ohio ESP Appeal decision provides a rationale upon which to reverse all of the non-SSR components of DP&L's 2016 ESP. For example, in DP&L's 2016 ESP, the Commission approved a competitive bidding process and master supply agreement,⁷ changes to the Alternative Energy rider true-up process,⁸ Reconciliation Riders,⁹ bifurcation of the Transmission Cost Recovery Rider,¹⁰ competitive retail enhancements,¹¹ and an Economic Development Fund.¹² Nowhere in the AEP Ohio ESP Appeal is there language that could reasonably be interpreted as reversing these components of DP&L's 2016 ESP. Consequently, DP&L's statement that its *entire* 2016 ESP was reversed on the basis of the AEP Ohio ESP Appeal is unfounded.

B. DP&L Is Barred From Withdrawing Its 2016 ESP Pursuant To R.C. 4928.143(C)(2)(a) Because DP&L Accepted The Commission's ESP Modifications By Allowing The ESP To Go Into Effect And There Is No Utility "Veto" Right Over Decisions Of The Supreme Court Of Ohio.

DP&L cites R.C. 4928.143(C)(2)(a) as the basis for its request to withdraw the 2016 ESP. But that statute is inapplicable to the current situation. R.C. 4928.143(C)(2)(a) provides:

*If the **commission** modifies and approves **an application** under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.*¹³

The right of a utility to withdraw an ESP under R.C. 4928.143(C)(2)(a) is intended to address circumstances under which a *proposed* ESP application is modified by the *Commission*.

Here, the circumstances at issue are vastly different than those envisioned by the Legislature in enacting R.C. 4928.143(C)(2)(a). DP&L's 2016 ESP is not merely a proposal. Rather, that ESP is the result of a final, appealable Commission order, as the Company itself conceded.¹⁴ And the Commission is not *voluntarily* modifying DP&L's 2016 ESP. Rather, the only modifications that should occur – immediate cessation of the

⁷ Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 16.

⁸ *Id.* at 31.

⁹ *Id.* at 35.

¹⁰ *Id.* at 36.

¹¹ *Id.* at 38.

¹² *Id.* at 42.

¹³ Emphasis added.

¹⁴ Fifth Entry on Rehearing, Case Nos. 12-426-EL-SSO *et al* (July 23, 2014); Notice of Cross-Appeal of the Dayton Power and Light Company (September 19, 2014) at 2 ("*Consequently, the Commission's ESP Orders are now final and appealable.*").

SSR during the 2016 ESP period and a refund of previously collected SSR charges - are entirely the result of the Court's mandate and are therefore involuntary on the part of the Commission. Accordingly, given that DP&L's requests stray far from the situation contemplated by the plain language R.C. 4928.143(C)(2)(a), the Company cannot use that statute as a basis upon which to withdraw its 2016 ESP.

A utility's statutory right to withdraw an ESP does not extend indefinitely. That right does not apply when the utility accepts a Commission-modified ESP by allowing that ESP to go into effect and then the Commission's final order is later modified by the Court. The law gives the utility a limited "veto" right over Commission modifications of a proposed application; it does not give the utility a "veto" right over decisions of the Supreme Court of Ohio.

Once the 2016 ESP was subject to a final, appealable Commission order and DP&L allowed the ESP to go into effect, the Company could no longer invoke R.C. 4928.143(C)(2)(a) to withdraw that ESP. Doing so would undermine the statutory appellate process provided for under R.C. 4903.13. The utility's statutory right to withdraw a proposed ESP must be read in concert with the other parties' statutory right to appeal a final Commission order and to receive the full relief ultimately provided by the Court. "*All statutes relating to the same general subject matter must be read in pari material, and in construing these statutes in pari material, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes.*"¹⁵ The best way to harmonize those two statutes is to bar a utility from invoking R.C. 4928.143(C)(2)(a) after the date upon which the Commission issues a final appealable order on the utility's proposed ESP and the utility has accepted the Commission's modifications by allowing the ESP to go into effect.

In 2015, the Court stated that "*[i]f the **commission** makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application.*"¹⁶ But the Court has never stated that a utility is entitled to thwart the Court's appellate mandate by withdrawing its ESP after receiving an unfavorable decision from the Court.

¹⁵ *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131).

¹⁶ *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056 at ¶26 (emphasis added).

Approving DP&L's requests would render the appellate process ineffective and put this Commission on a collision course with the Court. The resolution that DP&L seeks – reinstatement of its entire 2008 ESP – would simply replace one unlawful “*financial integrity*” charge (the SSR) with another (the Rate Stabilization Charge included in DP&L's 2008 ESP). The cursory nature of the Court's remand order seems to demonstrate a certain amount of frustration with the Commission's recent handling of ESP matters. That frustration would only grow if the Court is effectively ignored in this instance. Were the Commission to approve this attempted end-run around the Court's recent decision, it would substantially harm customers by forcing them to continue to pay unlawful “*transition revenues*” in direct contravention of the Court's mandate, unjustly enriching DP&L's corporate parent, Virginia-based AES.

II. Consistent With The Supreme Court of Ohio's Ruling, The Commission Should Immediately Cease Collection Of Costs Through the SSR And Require DP&L To Refund The Unlawful “*Transition Revenues*” Already Paid By Customers Through That Rider.

As discussed above, the Court expressly stated that the AEP Ohio ESP Appeal was the basis for its decision with respect to DP&L's 2016 ESP.¹⁷ In that AEP Ohio ESP Appeal, the Court's chosen remedy was to require AEP Ohio to refund to customers the unlawful “*transition revenues*” previously collected through the RSR.¹⁸ The Court did not find any conflict between its chosen remedy and the retroactive ratemaking principles set forth in *Keco Industries, Inc. v. Cinci. & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957). Accordingly, the same remedy applies to this case. Specifically, the Court's decision means that the Commission must require DP&L to immediately cease collection of costs through the SSR and to refund customers all SSR charges paid since September 4, 2013, when the SSR was initially approved by the Commission.¹⁹ The remainder of the Company's 2016 ESP should continue throughout its Commission-approved term, which is scheduled to end May 31, 2017.²⁰

¹⁷ See *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016).

¹⁸ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶40.

¹⁹ Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 25.

²⁰ Entry Nunc Pro Tunc, Case Nos. 12-426-EL-SSO *et al* (September 6, 2013) at 2.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should not jeopardize its own legal integrity in the eyes of the Supreme Court in order to prop up the financial integrity of DP&L and Virginia-based AES by indulging the Company's unlawful requests to evade the Court's holding. Instead, the Commission should deny DP&L's Motions outright. The Commission should also direct the Company to immediately cease collection of SSR costs and to refund all SSR costs paid by customers since September 4, 2013.

Respectfully submitted,



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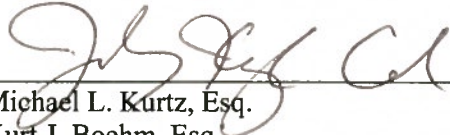
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August 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 11th day of August, 2016 to the parties listed on the attached Certificate of Service.



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in

Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 12-0426-EL-SSO,

Summary: Memorandum Ohio Energy Group (OEG's) Memorandum Contra Motion to Withdraw its Application and Motions to Implement Previously Authorized Rates electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group