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 Tariff.	**)** **)** **)**	**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 Section 4905.13, Revised Code.	**)** **)** **)** **)**	**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**
In the Matter of the Application of The 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 The Dayton Power and Light Company for Approval of Revised Tariffs.	**)** **)** **)**	**Case No. 12-427-EL-ATA**
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	**)** **)** **)**	**Case No. 12-428-EL-AAM**
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules	**)** **)** **)**	**Case No. 12-429-EL-WVR**
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	**)** **)** **)**	**Case No. 12-672-EL-RDR**

THE RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDUM CONTRA THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO WITHDRAW ITS APPLICATION AND TWO MOTIONS TO IMPLEMENT PREVIOUSLY AUTHORIZED RATES

August 11, 2016

I. INTRODUCTION

Pursuant to Rule 4901-1-12(B)(1), Ohio Administrative Code, the Retail Energy Supply Association ("RESA")[1] hereby files this Memorandum Contra to the two July 27, 2016 motions filed by The Dayton Power and Light Company ("DP&L") in Case Nos. 12-426-EL-SSO et al., as well as its July 27, 2016 motion filed in Case Nos. 08-1094-EL-SSO et al.[2] Through its three motions in the matters at bar, DP&L seeks to withdraw its second electric security plan ("ESP II") over two and one-half years into its term and to implement rates from its first electric security plan ("ESP I").

DP&L's primary authority for seeking to withdraw its ESP II is R.C. 4928.143(C)(2)(a), which allows a utility to withdraw an electric security plan ("ESP") if the Commission modifies the ESP application. DP&L's interpretation of the statute, however, means that utilities would have an unfettered ability to withdraw an ESP any time during the ESP term if the Commission had previously modified the ESP application. There would be, under DP&L's interpretation of the statute, no finality or certainty to any ESP and to the competitive retail marketplace.

A more reasonable interpretation of R.C. 4928.143(C)(2)(a) is to limit a utility's unilateral withdrawal of an ESP application to a reasonable time after a Commission modification of the application. The utility would then be able to (i) choose to accept the Commission's modifications and proceed under the ESP (which is what DP&L did) or (ii) timely

[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 08-1092-EL-SSO et al., Opinion and Order (June 24, 2009). RESA has contemporaneously with this Memorandum Contra filed a motion for leave to intervene in the DP&L ESP I proceeding.

withdraw its application and seek a new standard service offer (whether in the form of a market-rate offer under R.C. 4928.142 or a new ESP application under R.C. 4928.143).

The Commission should also reject DP&L's motion to implement pre-2013 rates. DP&L's argument that the Commission is required to return to pre-2013 rates is not based on a proper interpretation of the statutes upon which DP&L cites and relies.

The Commission's interpretation of R.C. 4928.143(C)(2)(a) and rulings on DP&L's three motions are important. Those rulings will not only apply to these DP&L proceedings, but also would extend to all other ESP proceedings, including those plans currently in effect in other utility service territories. A reasonable interpretation of the statute ensures that utilities, competitive suppliers and customers have stability and predictability rather than the unpredictability, confusion, and undue prejudice that would result if a utility is permitted to withdraw an ESP years into its term simply because there was an earlier Commission modification when initially approving that plan. Thus, the Commission should deny DP&L's motions.

II. BACKGROUND

DP&L sought approval of an application to establish its ESP II pursuant to R.C. 4928.143. Through a series of entries, the Commission approved the ESP II, subject to certain Commission modifications, for a term of January 1, 2014, to May 31, 2017. The entries were: (1) Opinion and Order dated September 4, 2013; (2) Entry Nunc Pro Tunc dated September 6, 2013; (3) Second Entry on Rehearing dated March 19, 2014; and (4) Fourth Entry on Rehearing

dated June 4, 2014 (collectively the "ESP II Decision"). The ESP II Decision was subsequently appealed to the Supreme Court of Ohio.[3]

Pursuant to Commission order, DP&L filed final tariffs implementing the ESP II on December 30, 2013 (the "Current Rates"). On February 22, 2016, DP&L filed its application to establish its third electric security plan ("ESP III") for a term of January 1, 2017 to December 31, 2026.[4]

On June 20, 2016, the Supreme Court of Ohio reversed the Commission's ESP II Decision on authority of *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608 (the "June 20, 2016 Supreme Court Decision").[5] Following that ruling, on July 27, 2016, DP&L filed the three motions in these proceedings.

By its first motion, DP&L moves to withdraw its Application in ESP II pursuant to R.C. 4928.143(C)(2)(a). By its second motion, DP&L moves to implement the rates that were in effect before the ESP II Decision (the "2013 Rates"). DP&L filed the third motion (a duplicate of the second motion) in its ESP I case.

III. ARGUMENT

A. DP&L's Motion to Withdraw its ESP II Over Two and a Half Years After its Tariffs Took Effect Should be Denied.

The Commission ruled on DP&L's ESP II application in September 2013 and approved DP&L's proposed tariff sheets in December 2013. After that filing, DP&L filed its final compliance tariffs and implemented those tariff sheets effective as of January 1, 2014. While

[3] *See In Re Dayton Power & Light Co.*, Case No. 2014-1505, Notice of Appeal of Industrial Energy Users-Ohio (Aug. 29, 2014), Notice of Cross-appeal of The Dayton Power and Light Company (Sept. 19, 2014) and Second Notice of Appeal of The Office of the Ohio Consumer's Counsel (Sept. 22, 2014).
[4] *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, *et al.*, Application (Feb. 22, 2016).
[5] *In re Dayton Power & Light Co.*, 2016-Ohio-3490.

DP&L raised issues on rehearing that were ruled upon by the Commission, DP&L accepted the Commission's decision on its ESP II application as evidenced by its tariff filings.

As of today, the ESP II has been in effect for over two and a half years. DP&L now seeks, for the first time, to withdraw its application in ESP II and revert back to the 2013 Rates. For the reasons set forth below, the Commission should reject establishing a precedent that a utility can proceed for years under an ESP that the Commission approved, but modified, only to unilaterally withdraw from the ESP at a time of its choosing and revert to its prior rates.

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.

Where the words of a statute are ambiguous, the Commission must construe a statute in a manner that reflects the intent of the General Assembly.[6] Further, the Commission must presume that "just and reasonable results [were] intended by the General Assembly."[7] *See also In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in its Electric Rates for its Entire Service Area*, Case Nos. 80-260-EL-AIR, et al., Opinion and Order (Mar. 18, 1981) at *84-85 ("[W]hile the principle of construction cited by the Applicant may be valid, the result produced by its application in this setting is so unreasonable that it cannot logically be invoked.").

With those statutory principles in mind, R.C. 4928.143(C)(2)(a) is silent on the question of *when* a utility can withdraw its application for an ESP. Under one interpretation, the statute gives the utility an *unlimited* amount of time to file a unilateral withdrawal following the

[6] *Clark v. Scarpelli*, 91 Ohio St. 3d 271, 275 (2001).
[7] *State ex rel. Brecksville Educ. Ass'n, OEA/NEA v. State Emp. Relations Bd*., 74 Ohio St.3d 665, 671 (1996).

Commission's approval and modification of its ESP application. As discussed below, that interpretation is unreasonable. The second and more reasonable interpretation is that a utility can withdraw an ESP only within a *reasonable* amount of time from the Commission's decision modifying and approving an ESP application. In that circumstance, the utility can either (i) choose to accept the Commission's modifications and proceed under the ESP or (ii) timely withdraw its application and seek a new standard service offer (whether in the form of a market-rate offer under R.C. 4928.142 or a new ESP application under R.C. 4928.143).

The purpose of R.C. 4928.143(C)(2)(a) supports the more reasonable interpretation of the statute. The Supreme Court of Ohio has stated that the purpose of R.C. 4928.143(C)(2)(a) is "to allow a utility to withdraw its proposed ESP if it dislikes the commission's modifications."[8] In other words, Section 4928.143(C)(2)(a) permits the utility the opportunity to *react* to a Commission's modification of its ESP application, and then either (i) proceed under the ESP, accepting the modification(s), or (ii) withdraw its application and seek a new standard service offer. But to construe R.C. 4928.143(C)(2)(a) as DP&L suggests would allow a utility the unilateral, unfettered right accept an ESP for years on end, only to withdraw its ESP application when the utility finds it opportune to do so and revert to its prior rates. That outcome is patently unreasonable and unduly prejudicial to the rights of other parties.

For example, it would be prejudicial for a utility to withdraw an ESP that has customer benefits back-loaded during the term of the ESP. An ESP could be structured to provide the utility certain pecuniary or other benefits during the beginning years of the ESP's term, while requiring the utility to pay certain costs or bear other responsibilities that benefit ratepayers during the later years of the term.[9]

[8] *In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 30.
[9] Indeed, the Commission is currently considering such an ESP in another proceeding.

To adopt the interpretation advanced by DP&L would permit the utility to accept the benefits of an ESP approved and modified by the Commission (which benefits could come at the front-end of the ESP's term) but avoid any of its costs or other responsibilities (which could come at the back end) by simply filing a late-term withdrawal on the grounds that the Commission made certain modifications when it *first* approved the ESP. Adopting such a precedent would give license to utilities to rely on R.C. 4928.143(C)(2)(a) to their exclusive benefit and avoid commitments that arise later in an ESP and potentially undermining the overall benefits of an ESP.

Just as important, allowing utilities unlimited time to withdraw an ESP under R.C. 4928.143(C)(2)(a) would be highly prejudicial to competitive suppliers and customers. As a general matter, competitive suppliers enter into contracts with their customers and make other significant business calculations based on their reasonable reliance that the rates approved under an ESP will continue for the duration of the ESP's term. Permitting the utility to unilaterally withdraw its ESP years after its approval and modification, and thereby revert the utility's rates to their pre-ESP levels, would prejudice the ability of competitive suppliers to continue operating under such contracts and would create confusion with customers.

Outcomes like that could not have been within the reasonable contemplation of the General Assembly when enacting R.C. 4928.143(C)(2)(a). If the purpose of R.C. 4928.143(C)(2)(a) is to permit the utility to back out of an ESP if it "dislikes" the Commission's modifications, then the Commission can give full effect to the statute, while avoiding the harms outlined above, by interpreting R.C. 4928.143(C)(a)(2) to give the utility a reasonable amount of time to either accept the Commission's modifications and proceed under the ESP or withdraw its application and seek a new standard service offer.

Here, DP&L waited for the unreasonably long period of almost three years after the approval and modification of ESP II in September of 2013 before petitioning the Commission for a withdrawal.[10] For reasons discussed above, it should not be permitted to do so and its three motions should be denied.

B. DP&L's Motions to Revert to its 2013 Rates Should Be Denied.

DP&L contends that by virtue of the June 20, 2016 Supreme Court Decision and certain provisions of Revised Code Chapter 4928, the Commission is required to implement the utility's 2013 Rates. DP&L misconstrues the applicable law and these two motions should be denied.

1. DP&L's current rates should remain in effect until the Commission issues an order consistent with the June 20, 2016 Supreme Court Decision.

DP&L correctly acknowledges the relevance of the Court's decision in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105 (1976) (the "*CEIC Case*"). In that case, the Supreme Court of Ohio addressed the consequence of reversing and remanding a Commission decision that had approved a utility's rates. The Court held that its decision "does not reinstate the rates in effect before the commission's order or replace that rate schedule as a matter of law, but is a mandate to the commission to issue a new order."[11] Therefore, the "rate schedule filed with the commission [i.e., the rate schedule that the Court had determined was unlawful] remains in effect until the commission executes this court's mandate by an appropriate order."[12]

[10] Moreover, RESA notes that DP&L has ignored the requirements of R.C. 4909.18 which require a public utility to file an application with the Commission to "establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same[.]" Instead, DP&L has filed a notice of proposed tariffs in Case No. 08-1094-EL-SSO et al.

[11] The *CEIC Case*, at paragraph two of the Syllabus.

[12] *Id.* at 116-117.

The Current Rates adopted under DP&L's ESP II constitute the "rate schedule filed with the commission." Therefore, the *CEIC Case* provides that the Current Rates are to remain in effect until the Commission issues a subsequent order executing the June 20, 2016 Supreme Court Decision. Conversely, the *CEIC Case* does not require the Commission to implement the 2013 Rates, as DP&L claims.

2. Revised Code Chapter 4928 does not require the Commission to revert to DP&L's 2013 Rates.

DP&L also cites several provisions of Revised Code Chapter 4928 allegedly to advance its claim that the Commission is required to implement the 2013 Rates. None of these provisions are availing to DP&L.

First, DP&L cites R.C. 4928.143(C)(2)(b), which provides that:

> If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

This provision is triggered upon a termination of an ESP pursuant to its withdrawal under R.C. 4928.143(C)(2)(a). But for the reasons discussed above, DP&L should not be permitted to withdraw its ESP almost three years after the Commission's ESP II Decision. Therefore, R.C. 4928.143(C)(2)(b) does not apply.

Next, DP&L cites R.C. 4928.141(A), which states, in relevant part, that "[o]nly a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard

service offer for the purpose of section 4928.14 of the Revised Code." This provision similarly does not require the Commission to reinstate the 2013 Rates. As made clear by the *CEIC Case* until the Commission issues an order consistent with the Supreme Court's June 20, 2016 Decision, the Current Rates, being the rates approved by the Commission in connection with DP&L's ESP II, remain in effect. Those rates will continue to "serve as the utility's standard service offer" for purposes of R.C. 4928.141(A).

Finally, DP&L points to R.C. 4905.32, which states that: "[n]o public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." But as discussed above, until the Commission issues an order executing the Supreme Court's June 20, 2016 Decision, the Current Rates serves as the rates that are "in effect at the time." Nothing in R.C. 4905.32 requires the Commission to revert to the 2013 Rates.

C. The Commission Should Ensure Market Certainty.

Regardless of how the Commission resolves the Supreme Court's June 20, 2016 Decision, it should protect and ensure certainty in the competitive retail marketplace. Taking DP&L's motions to implement rates on their face (which request a return to 2013 Rates), DP&L's request will upset and negatively interfere with existing customer contracts, existing prices and customer relationships. The Commission can avoid these negative impacts to the competitive retail marketplace and the market participants by maintaining certainty as to customer pricing and to cost components, such as transmission, in any order the Commission issues in the matters at bar.

Moreover, the Commission should confirm that its non-rate-related rulings and its directives to DP&L in the ESP II remain in place. For example, the Commission's Second Entry

on Rehearing directed DP&L to "divest all of its generation assets by no later than January 1, 2016."[13] The same entry directed DP&L to procure, "through the CBP auction process, 100 tranches of a full-requirements product for a term that is not less than quarterly or more than annually until a subsequent SSO is authorized" if a subsequent SSO is not authorized by April 1, 2017.[14] By confirming its non-rate-related rulings and directives, the Commission will further ensure certainty in the competitive retail marketplace.

IV. CONCLUSION

DP&L's three motions on their face ask this Commission to allow it to withdraw its ESP II over two and a half years into the term of the ESP II and reinstate its 2013 Rates. The Commission should not grant these motions because to do so would set a dangerous precedent that the Commission will never escape. Instead, the Commission should take the opportunity in any action its takes in these proceedings to protect and ensure certainty in the competitive retail marketplace.

Respectfully Submitted,

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[13] Second Entry on Rehearing, ¶27.
[14] *Id.*

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket cards who have electronically subscribed to these cases. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 11th day of August, 2016.

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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 Contra to DP&L's Motion to Withdraw its Application and Motions to Implement Previously Authorized Rates electronically filed by Mrs. Gretchen L. Petrucci on behalf of Retail Energy Supply Association