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. 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 OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP'S MEMORANDUM CONTRA MOTIONS OF THE DAYTON POWER AND LIGHT COMPANY TO WITHDRAW ITS APPLICATION AND IMPLEMENT PREVIOUSLY AUTHORIZED RATES

I. Introduction.

On July 27, 2016, The Dayton Power and Light Company (DP&L) filed two motions to withdraw its second electric security plan (ESP II) application and to implement previously authorized rates that were in effect prior to the Commission's decision on September 4, 2013 in DP&L's ESP II case.[1] DP&L's rationale for seeking the relief requested in the motions is the Ohio Supreme Court's ruling on the Commission's decision in DP&L's ESP II case.[2] DP&L's

[1] DP&L Motion to Withdraw Application (July 27, 2016) and DP&L Motion to Implement Previously Authorized Rates (July 27, 2016).

[2] DP&L Motion to Implement Previously Authorized Rates, Memorandum in Support at 1.

assertion that the Ohio Supreme Court reversed "in total"[3] its ESP II is a mischaracterization of both the essential issue before the Court as well as the resulting decision. The Court's decision reversed the Commission's approval of DP&L's SSR, it did not, as DP&L argues, reverse the Commission's entire ESP II decision.

DP&L's arguments suggest that it has a continuing right to withdraw its ESP II application at any time since the Commission modified its ESP II application on September 4, 2013.[4] However, pursuant to Section 4928.143(C)(2)(a), Revised Code (R.C.), DP&L's ESP II application was modified by the Commission, approved in 2013, and the standard service offer was implemented by DP&L, all resulting in an acceptance of the Commission's modifications. By acceptance, DP&L forfeited its right to withdraw that application.

Further, regardless of DP&L's mischaracterization of the Court's decision related to the SSR within its ESP II application, the rates and tariffs that DP&L seeks to implement include a combination of provisions that DP&L finds most favorable from both its ESP I and ESP II cases in violation of the law. Even if DP&L could permissibly withdraw its ESP II under Section 4928.143(C)(2)(a), R.C., DP&L is only authorized to continue "the provisions, terms, and conditions of the utility's most recent standard service offer, along with [certain adjustments for] fuel costs" until a new ESP is authorized, pursuant to Section 4928.143(C)(2)(b), R.C. Permitting DP&L to blend favorable provisions from its ESP I and ESP II applications directly contradicts the statute.

Therefore, for these reasons and those articulated below, DP&L's motions to withdraw its ESP II and to implement previously authorized rates (in part) should be denied.

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[3] Id.

[4] DP&L Motion to Withdraw Application, Memorandum in Support at 1.

II. Discussion.

A. DP&L does not have an ongoing right to withdraw its ESP II application, which was modified and approved by the Commission almost three years ago.

Under Section 4928.143(C)(2)(a), R.C. "[i]f 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." Therefore, given that DP&L accepted the Commission's September 2013 modifications, implemented its ESP II, and collected charges from customers, DP&L forfeited its right to withdraw its ESP II under Section 4928.143(C)(2)(a), R.C. DP&L cannot now, almost three years after implementing its ESP II, decide to exercise its right to withdraw its ESP II application because provisions within that application are no longer favorable. To do so would plainly violate the meaning of Section 4928.143(C)(2)(a), R.C. and be unjust and unreasonable. If the Commission modifies an ESP application and the utility accepts that modification, Section 4928.143(C)(2)(a), R.C., does not apply.[5]

The Ohio Supreme Court's decision regarding the lawfulness of the SSR, a provision within the DP&L's ESP II, does not trigger DP&L's right to withdraw its ESP II given that the Commission did not further modify the ESP II, as required by law.[6] DP&L cannot read words into a statute that do not exist.[7] Moreover, the Commission has no authority to act beyond its statutory powers[8] and the statute does not speak to a utility's right to withdraw an ESP application upon findings by the Supreme Court that a provision within the ESP is unlawful on

[5] See *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 26.

[6] Section 4928.143(C)(2)(a), R.C.

[7] *In re Application of E. Ohio Gas Co.*, 141 Ohio St. 3d 336, 2014-Ohio-3073 (July 16, 2014).

[8] *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶32 (citing Discount Cellular, Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53).

appeal. Therefore, Section 4928.143(C)(2)(a), R.C., precludes DP&L from withdrawing its ESP II application almost three years after it was accepted and implemented.

Just as it would be unjust and unreasonable for the Commission to modify an ESP application after it had been approved and implemented,[9] it would similarly be unjust and unreasonable for a utility to withdraw an application after it had been modified, approved, accepted, and implemented absent further Commission modification.

B. The Ohio Supreme Court reversed only DP&L's Service Stability Rider and not the entire ESP II Commission decision.

DP&L's mischaracterization of the Ohio Supreme Court's decision as a reversal of the Commission's ESP II decision in its entirety ignores the context surrounding that decision. As stated by U.S. Supreme Court Justice Scalia, context is "a tool for understanding the terms of the law, not an excuse for rewriting them."[10] DP&L's failure to consider context in the Court's decision ignores these principles and results in a misunderstanding of that decision.

In order to understand the Ohio Supreme Court's decision in DP&L's ESP II case, it is imperative to understand what the Court did in *In re Application of Columbus S. Power Co. (AEP Ohio's ESP II),* as the Court directly referenced that case in its decision.[11]

The Court's decision in *AEP Ohio's ESP II* case addressed two main issues arising from DP&L's ESP II – the Commission's approval of AEP Ohio's Retail Stability Rider (RSR) and setting the threshold of the significantly excessive earnings test (SEET). The Court reversed the Commission's decision approving the RSR, stating that it permitted AEP Ohio to unlawfully

[9] Id. at ¶ 30 (citing R.C. 1.47(C)).

[10] *King v. Burwell,* 135 S.Ct. 2480, 2497 (2015)(Scalia, J., dissenting). See also, *In re Application of Ohio Power Co.,* 140 Ohio St.3d 509, 2014-Ohio-4271, ¶ 26 (explaining that "context matters" when it comes to interpretation).

[11] *In re Application of Dayton Power & Light Co.,* Slip Opinion 2016-Ohio-3490, ¶ 1 stating "The decision of the [Commission] is reversed on the authority of *In re Application of Columbus S. Power Co.,* _ Ohio St.3d _, 2016-Ohio-1608, _ N.E.3d_."

collect the equivalent of transition revenues.[12] Further, the Court reversed the Commission's decision regarding the SEET-related directive.[13] Thus, when the Court stated in the current proceeding that DP&L's ESP II was reversed on the authority of *In re Application of Columbus S. Power Co.*, the Court was referring to either what it considered the "most prominent" issue in the case regarding the RSR,[14] or the SEET-related directive.

Several parties filed appeals of the Commission's decision in DP&L's ESP II case. IEU-Ohio's notice of appeal challenged the Commission's approval of DP&L's SSR and the Commission's application of the ESP versus MRO test.[15] The Office of the Ohio Consumers' Counsel's (OCC) notice of appeal challenged the Commission's approval of the SSR, the lawfulness of the Commission's September 6, 2013 Nunc Pro Tunc entry, and certain procedural issues associated with the rehearing phase of the case.[16] DP&L's notice of cross-appeal challenged certain aspects associated with the Commission's authorization of the SSR-E, the Commission's directive to DP&L to transfer generating assets, and the Commission's directives on the competitive bidding process.[17]

Within the Court's jurisdiction of the number of issues raised on appeal, the issue regarding the Commission's approval of DP&L's SSR is the only issue that would be subject to the holding in *AEP Ohio's ESP II.* First, no party raised a SEET issue on appeal, therefore, the Court could not feasibly be referencing that issue in its decision. Second, the primary issue

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[12] *In re Application of Columbus S. Power Co.,* 144 Ohio St.3d 1, 2016-Ohio-1608, ¶ 14.

[13] Id. at ¶ 64-66.

[14] Id. at ¶ 14.

[15] IEU-Ohio Notice of Appeal at 2-6, Ohio Supreme Court Case No. 2014-1505 (August 29, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=752434.pdf.

[16] OCC Notice of Appeal at 2-4, Ohio Supreme Court Case No. 2014-1505 (September 22, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=753533.pdf.

[17] DP&L Notice of Cross-Appeal at 2-3, Ohio Supreme Court Case No. 2014-1505 (September 19, 2014), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=753463.pdf.

presented to the Court on appeal of the Commission's decision in DP&L's ESP II case was whether approval of the SSR constituted authorization of the collection of unlawful transition revenues. IEU-Ohio and OCC relied heavily on *AEP Ohio's ESP II* in supplemental briefing as well as in oral argument to support this argument.[18] Therefore, it is only reasonable that the Court's decision reversing the Commission's decision under the authority of *AEP Ohio's ESP II,* was specifically reversing the Commission's approval of DP&L's SSR as an authorization to collect unlawful transition revenues or the equivalent. DP&L's claim that the Commission's decision reversed its ESP II in totality is misleading, ignores the entire context of the case and case precedent, and should be rejected.

C. DP&L's request to implement the RSC is an attempt to circumvent the Ohio Supreme Court's reversal of the SSR.

DP&L's motion to implement previously authorized rates includes a request to implement the Rate Stabilization Charge (RSC) from its ESP I. Given the striking similarities in the descriptions between the two charges, this request is a clear attempt to circumvent the Ohio Supreme Court's ruling, which reversed the Commission's authorization of DP&L's SSR. DP&L describes the RSC in its proposed tariffs as a mechanism that "is intended to compensate DP&L for providing stabilized rates for customers."[19] Similarly, DP&L describes the SSR in its proposed tariffs in the following manner: "The [SSR] is intended to compensate DP&L for providing stabilized service for customers."[20] It is clear that DP&L intends for the RSC to function in the same manner as the SSR, which has been deemed unlawful by the Court.

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[18] See Joint Motion of IEU-Ohio and OCC to Vacate the Orders of the Commission Authorizing the SSR and to Remand the Case to the Commission for Orders Consistent with the Court's Vacatur at 5, Case No. 2014-1505 (May 12, 2016) and Video Archive of Oral Argument, Case No. 2014-1505 (June 14, 2016), http://www.ohiochannel.org/video/case-no-2014-1505-in-re-application-of-dayton-power-light-co-to-establish-a-std-serv-offer-in-the-form-of-an-elec-sec-plan.

[19] DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Fourth Revised Sheet No. G25, Page 1 of 2.

[20] DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Third Revised Sheet No. G29, Page 1 of 1.

Therefore, authorization and implementation of the RSC would constitute collection of unlawful transition revenues and should be denied.

D. DP&L's request to combine provisions from its ESP I and its ESP II violates Section 4928.143(C)(2)(b), R.C.

Under Section 4928.143(C)(2)(b), R.C. when a utility seeks to terminate an ESP application "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 [certain adjustments for] fuel costs" until a new ESP is authorized. This provision does not permit a utility to combine favorable provisions and terms of multiple ESPs, as DP&L unlawfully seeks to do.

DP&L admits that it seeks to implement a combination of ESP provisions when it states in its tariff filings that two riders and tariffs from ESP I would be implemented, certain distribution, transmission, and generation tariffs that are currently in effect under ESP II would remain in place as they exist today, and other tariff provisions that exist today would be eliminated.[21] Further, DP&L states it intends to honor existing contracts with winning competitive bid suppliers and reflect the competitive bid rate in its SSO pricing established in its ESP II.[22] This market-based generation pricing has its origins in ESP II, not ESP I.[23]

The language of the statute does not permit DP&L to pick and choose favorable provisions from ESP I and favorable provisions from ESP II if it withdraws its current ESP.

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[21] DP&L Notice of Filing Proposed Tariffs at 2, Case No. 08-1094-EL-SSO, et al. (August 1, 2016).

[22] Id.

[23] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, Case No. 12-426-EL-SSO, et al., Opinion and Order at 15-16 (September 4, 2013).

Under the clear language of the statute, DP&L must "continue the provisions, terms, and conditions of [its] most recent standard service offer."[24]

Therefore, even if DP&L could permissibly avail itself of the right to withdraw its ESP II under Section 4928.143(C)(2)(a), R.C., DP&L's request to implement a mix of provisions from its ESP I and ESP II is unreasonable and unlawful under Section 4928.134(C)(2)(b), R.C.

III. Conclusion.

Therefore, the Commission should deny DP&L's request to withdraw its ESP II and partially implement previously authorized rates. As previously stated, DP&L's attempts to blend favorable rates and tariffs from its ESP I and ESP II, as well as circumvent the Ohio Supreme Court's ruling regarding the SSR by implementing a similar RSC from ESP I are unreasonable and unlawful. For all of the foregoing reasons, the Commission should deny DP&L's motions.

Respectfully submitted,

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[24] Section 4928.143(C)(2)(b), R.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 11, 2016.

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