

**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
)	
)	

**THE OHIO MANUFACTURERS' ASSOCIATION COMMENTS ON THE DAYTON
POWER AND LIGHT COMPANY'S PROPOSED TARIFFS**

I. Introduction.

Pursuant to the Entry issued August 3, 2016¹, the Ohio Manufacturers' Association (OMA) respectfully submits comments on The Dayton Power & Light Company's (DP&L) proposed tariffs filed in the above-captioned proceedings on August 1, 2016.² On July 27, 2016, DP&L filed three motions in two separate dockets to justify its tariff filing.³ DP&L

¹ Attorney Examiner Entry (August 3, 2016).

² DP&L Notice of Filing Proposed Tariffs at 1 (August 1, 2016).

³ DP&L filed the motion to implement previously authorized rates in this docket. Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016); DP&L also filed two motions in the docket of its current ESP II. *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., Motion of the Dayton Power and Light

moved to withdraw its current electric security plan (ESP II) application⁴ and implement different rates, stating the recent Ohio Supreme Court's decision in its ESP II case as the basis for such motions.⁵ OMA filed a memorandum contra DP&L's motions on August 11, 2016. For all of the reasons stated herein, as well as those arguments included in OMA's previously filed memorandum contra DP&L's motions incorporated by reference as if fully rewritten herein, the Public Utilities Commission of Ohio (Commission) should deny DP&L's request to implement proposed tariffs.⁶ Instead, the Commission should order DP&L to immediately stop collection of the SSR rider from customers as was the intent and directive of the Court. Continuing to collect costs through the SSR rider which the Court has deemed to be unlawful is unjust and unreasonable. Any further delay of terminating the collection of the SSR rider from customers would cause further injury to customers. DP&L has already been unlawfully collecting the SSR rider from customers for almost three years. DP&L should be ordered to stop this unlawful collection immediately.

Company to Withdraw its Application in this Matter (July 27, 2016); Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016).

⁴ *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., Application of the Dayton Power and Light Company for Approval of its Market Rate Offer (March 30, 2012.)

⁵ *In re Application of Dayton Power & Light Co.*, Slip Opinion, 2016-Ohio-3490 (June 20, 2016). Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016); *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., Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter (July 27, 2016); Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates (July 27, 2016).

⁶ The Ohio Manufacturers' Association Memorandum Contra Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Case No. 08-1094-El-SSO, et al. (August 11, 2016).

II. Comments

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.

Prior to reviewing the substance of DP&L's proposed tariffs, it is important to consider whether it is even lawful for DP&L to withdraw its ESP II in order to implement the proposed tariffs.

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." On September 4, 2013, the Commission issued an opinion and order modifying and approving DP&L's ESP II application.⁷ Subsequently, DP&L accepted the Commission's September 2013 modifications, implemented its ESP II, and collected charges from customers for almost three years. A utility's filing of tariffs implementing the terms and conditions of a Commission's order approving an ESP also serves as acceptance of that ESP.⁸ The Commission has determined that when a utility implements its modifications to an ESP, the utility has accepted those modifications. Thus, given DP&L's acceptance and implementation of the Commission's modifications to its ESP II application by filing tariffs and collecting costs from customers pursuant to those tariffs, DP&L forfeited its right to withdraw its ESP II.

⁷ *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 (September 4, 2016).

⁸ See e.g., *In the Matter of the Application of Ohio Power Company's Proposal to enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, et.al., Opinion and Order at 106 (March 31, 2016); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide a Standard Service Offer pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order at 99 (March 31, 2016).

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., directly contradict case precedent, 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.⁹

DP&L cites to no other Commission order modifying its ESP application. Moreover, 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.¹⁰ DP&L cannot read words into a statute that do not exist.¹¹ Moreover, the Commission has no authority to act beyond its statutory powers¹² and the statute does not speak to a utility's right to withdraw an ESP application upon findings by the Court that a provision within the ESP is unlawful on 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.¹³

Just as it would be unjust and unreasonable for the Commission to modify an ESP application after it had been approved and implemented,¹⁴ it would similarly be unjust and

⁹ See *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 26.

¹⁰ Section 4928.143(C)(2)(a), R.C.

¹¹ *In re Application of E. Ohio Gas Co.*, 141 Ohio St. 3d 336, 2014-Ohio-3073 (July 16, 2014).

¹² *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).

¹³ See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al. at 106 (March 31, 2016) stating "the filing of tariffs consistent with this Opinion and Order, including its modifications to the stipulation, shall be deemed as acceptance of the Order and the modifications by AEP Ohio."

¹⁴ *Id.* at ¶ 30 (citing R.C. 1.47(C)).

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.

In addition to understanding whether it is lawful for DP&L to withdraw its ESP II application, it is also critical to understand DP&L's rationale for requesting to file its proposed tariffs as it did. DP&L states that the Ohio Supreme Court's ruling on the Commission's decision in DP&L's ESP II case reversed "in total" its ESP II.¹⁵ This is a clear mischaracterization of the Court's decision and ignores the context surrounding that decision. In reality, and with appropriate context, the Court decision is a reversal of DP&L's Service Stability Rider (SSR), not its ESP II in its entirety.

DP&L's mischaracterization of the 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."¹⁶ 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 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.¹⁷

¹⁵ DP&L Notice of Filing Proposed Tariffs at 1.

¹⁶ *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).

¹⁷ *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_."

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 collect the equivalent of transition revenues.¹⁸ Further, the Court reversed the Commission’s decision regarding the SEET-related directive.¹⁹ 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,²⁰ 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.²¹ 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.²² 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.²³

¹⁸ *In re Application of Columbus S. Power Co.*, 144 Ohio St.3d 1, 2016-Ohio-1608, ¶ 14.

¹⁹ *Id.* at ¶ 64-66.

²⁰ *Id.* at ¶ 14.

²¹ 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.

²² 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.

²³ 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.

Within the Court's jurisdiction of the 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*. Given that no party raised a SEET issue on appeal, the Court could not feasibly be referencing that issue in its decision. Second, the primary issue 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. The Court's decision in *AEP Ohio's ESP II* was relied upon heavily in supplemental briefing and oral argument to support the appeal of the SSR.²⁴ 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 tariffs that contain the RSC is an attempt to circumvent the Ohio Supreme Court's reversal of the establishment of SSR.

Even if DP&L could permissibly withdraw its ESP II under Section 4928.143(C)(2)(a), R.C., 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.

²⁴ 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>. See also Correspondence letter in support of IEU and OCC filed on behalf of OMAEG in *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. (July 15, 2016).

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.”²⁵ 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.”²⁶ 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. Therefore, authorization and implementation of the RSC would constitute collection of unlawful transition revenues and should be denied.

D. DP&L’s request to implement tariffs that 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 through its tariff filing.

DP&L admits that it seeks to implement a combination of ESP provisions when it states in its tariff filing 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.²⁷ Further, DP&L states it intends to honor existing contracts with winning

²⁵ DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Fourth Revised Sheet No. G25, Page 1 of 2.

²⁶ DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Third Revised Sheet No. G29, Page 1 of 1.

²⁷ DP&L Notice of Filing Proposed Tariffs at 2 (August 1, 2016).

competitive bid suppliers and reflect the competitive bid rate in its SSO pricing established in its ESP II.²⁸ This market-based generation pricing has its origins in ESP II, not ESP I.²⁹

DP&L states in its proposed tariffs that it seeks to implement the Environmental Investment Rider and Rate Stabilization Charge from its ESP I.³⁰ Further, DP&L states that it seeks to continue, in its current form, a number of distribution tariffs (D1-D39), transmission tariffs (T1-T-9), and certain generation tariffs (G1-G-9, G20-G23, G26-G28).³¹ These requests include a clear blending of provisions and terms from both its ESP I and its ESP II.

More specifically, in addition to the RSC rider described above, DP&L is requesting to continue in its current form the Transmission Cost Recovery Rider (TCRR) (T8 and T9), the Storm Damage Recovery Rider (D30), and the Reconciliation Rider (D29). Given these were all approved as part of DP&L's ESP II,³² if DP&L withdraws its ESP II, these riders cannot continue as they exist today. For example, the TCRR must be implemented as it was in ESP I, which means it should be fully bypassable. Additionally, DP&L's Storm Damage Recovery and Reconciliation Riders did not exist in ESP I, and therefore, they should be eliminated in their entirety. Any continuation of these ESP II riders would clearly violate of Section 4928.143(C)(2)(b), R.C.

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.

²⁸ Id.

²⁹ *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).

³⁰ DP&L Notice of Filing Proposed Tariffs at 2 (August 1, 2016).

³¹ Id.

³² *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 34-35, 36, and 41-42 (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.”³³

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 tariff provisions from its ESP I and ESP II is unreasonable and unlawful under Section 4928.134(C)(2)(b), R.C. and should be rejected.

E. DP&L’s request to implement its proposed tariffs should be rejected and the Commission should instead direct DP&L to immediately cease collection of the unlawful SSR Rider as ordered by the Ohio Supreme Court.

As previously discussed, in issuing its decision regarding DP&L’s ESP II, the Ohio Supreme Court specifically reversed the Commission’s decision “on the authority of” *AEP Ohio’s ESP II*, which included the reversal of the Commission’s approval of the SSR as an unlawful collection of transition revenues.³⁴ Further, in the *AEP Ohio ESP II* case, the Court ordered that AEP Ohio effectively refund to customers the unlawful transition revenues that had been collected under the RSR.³⁵

Similarly, the Commission should require DP&L to immediately cease collection of all costs from customers under the SSR.³⁶ This action is consistent with the Ohio Supreme Court’s decision in the *AEP Ohio ESP II* case and there exists no lawful reason for any further delay in ceasing collection of costs or ordering a refund.

³³ Section 4928.143(C)(2)(b), R.C.

³⁴ *In re Application of Dayton Power & Light Co.*, Slip Opinion, 2016-Ohio-3490 at ¶1.

³⁵ *In re Application of Columbus S. Power Co.*, Slip Opinion, 2016-Ohio-1608 at ¶40 (“adjust the balance of [AEP Ohio’s] deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP.”).

³⁶ *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).

III. Conclusion.

DP&L's attempts to blend favorable rates and tariffs from its ESP I and ESP II in its proposed tariff filing, 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 and should be rejected by the Commission. Instead, the Commission should order DP&L to immediately stop collection of the SSR rider from customers as was the intent and directive of the Court. DP&L's delay tactics of filing unlawful and unreasonable motions and tariffs in order to continue to charge customers the unlawful SSR rider during the pendency of such motions should not be tolerated.

For the reasons stated herein, OMA requests that the Commission deny DP&L's request to implement the proposed tariffs and order DP&L to remove the SSR tariff sheet or re-file it with the rate set at zero.

Respectfully submitted,

/s/ Danielle G. Walter
Joel E. Sechler (0076320)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: sechler@carpenterlipps.com
ghiloni@carpenterlipps.com
(willing to receive service by email)

Counsel for the OMA

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 12, 2016.

/s/ Danielle G. Walter

Danielle G. Walter

Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com
Arthur.meyer@dplinc.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Philip.sineneng@thompsonhine.com
bmcMahon@emh-law.com
Elizabeth.watts@duke-energy.com
ricks@ohanet.org
mwarnock@bricker.com
dborchers@bricker.com
gary.a.jeffries@dom.com
cmooney2@columbus.rr.com
whitt@whitt-sturtevant.com
Campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
vparisi@igsenergy.com
barthroyer@aol.com
trent@theoec.org
Williams.toddm@gmail.com
ejacobs@ablelaw.org
William.wright@ohioattorneygeneral.gov
Thomas.lindgren@ohioattorneygeneral.gov
Thomas.mcNamee@ohioattorneygeneral.gov
Werner.margard@ohioattorneygeneral.gov
mjsettineri@vorys.com

smhoward@vorys.com
david.fein@constellation.com
Cynthia.a.fonner@constellation.com
Tasha.hamilton@constellation.com
Tony_long@ham.honda.com
Stephen.bennett@exeloncorp.com
rbrundrett@ohiomfg.com
dconway@porterwright.com
aemerson@porterwright.com
haydenm@firstenergycorp.com
jiang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
aehaedt@jonesday.com
jejadwin@aep.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Alan.starkoff@icemiller.com
Chris.michael@icemiller.com
ssolberg@eimerstahl.com
mjsatterwhite@aep.com
stnourse@aep.com
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com
gpoulos@enernoc.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
henryeckhart@aol.com
wis29@yahoo.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/12/2016 5:20:20 PM

in

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

Summary: Comments The Ohio Manufacturers' Association Comments On The Dayton Power And Light Company's Proposed Tariff electronically filed by Debra A Gaunder on behalf of The Ohio Manufacturers' Association