

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-426-EL-SSO
for Approval of Its Market Rate Offer.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-427-EL-ATA
for Approval of Revised Tariffs.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-428-EL-AAM
for Approval of Certain Accounting)	
Authority.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-429-EL-WVR
for Waiver of Certain Commission Rules.)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 12-672-EL-RDR
to Establish Tariff Riders.)	

APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

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**ATTORNEYS FOR INDUSTRIAL ENERGY
USERS-OHIO**

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Under R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") seeks rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") on August 26, 2016 for the following reasons:

1. **ASSIGNMENT OF ERROR I:**
The Order permitting the Dayton Power and Light Company to withdraw its electric security plan application is unlawful because the condition permitting the electric distribution utility to withdraw its application under R.C. 4928.143(C)(2)(a) is not satisfied when the Commission eliminates a previously

authorized rider as a result of a Supreme Court decision reversing that authorization.

2. **ASSIGNMENT OF ERROR II:**

The Finding and Order is unlawful because it failed to explain its rationale and respond to contrary positions regarding the request of Industrial Energy Users-Ohio to begin a proceeding to determine an appropriate mechanism to adjust the rates of the Dayton Power and Light Company to account for billing and collection of the unlawful Service Stability Rider.

3. **ASSIGNMENT OF ERROR III:**

The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful Service Stability Rider and to prospectively adjust the rates of the Dayton Power and Light Company in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission's failure to initiate such a proceeding is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and direct that proceedings affording prospective relief be initiated.

The reasons supporting this Application for Rehearing are set out in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. INTRODUCTION

When the Supreme Court of Ohio reversed the Commission's order authorizing the Service Stability Rider ("SSR"), the Commission was mandated to implement that decision and eliminate the unlawful rider from the electric security plan ("ESP") of the Dayton Power and Light Company ("DP&L"). Further, the reversal of the order required the Commission to establish a proceeding to determine the amount billed and collected by DP&L under the unlawful authorization and direct that the amount be returned to customers through adjustments to future rates. The Court's decision, however, did not

satisfy the statutory requirement permitting DP&L to withdraw its ESP application. When the Commission issued its order granting DP&L's motion to withdraw its ESP and dismissed the proceeding without determining the amount that DP&L had unlawfully billed and collected under the SSR, the Commission erred.

Accordingly, the Commission should grant rehearing, reverse its decision to dismiss the proceeding, and direct DP&L to implement the current ESP with the exception of the unlawful SSR. Further, the Commission should initiate a proceeding to determine the amount that DP&L billed and collected under the SSR and direct DP&L to prospectively reduce rates to account for that amount.

II. FACTS

On September 4, 2013, the Commission modified and approved an application for an ESP for DP&L in an Opinion and Order ("Opinion"). As a term of the ESP, the Commission authorized DP&L to bill and collect \$110 million annually under the guise of a stability rider, the SSR. The Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU-Ohio") sought rehearing of the authorization of the SSR. When the Commission denied rehearing of the authorization of the rider, IEU-Ohio and OCC filed appeals of the authorization with the Supreme Court of Ohio.

IEU-Ohio and OCC also sought stays of the authorization of the billing and collection of the SSR from the Commission and the Court both before and after they sought appellate review. These motions were denied.

On June 20, 2016, the Supreme Court of Ohio found that the Commission unlawfully authorized DP&L to bill and collect transition revenue or its equivalent under the guise of a "stability rider." *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3490 (June 20, 2016). On June 21, 2016, IEU-Ohio and OCC sought

expedited orders terminating the billing and collection of the rider. DP&L initially resisted those efforts by claiming that the Clerk of the Court had not issued the mandate of the Court to the Commission. The Clerk of the Court then issued the mandate on July 6, 2016, thus removing the claimed procedural barrier.

While the motion to terminate billing and collection of the SSR was pending, DP&L filed three motions seeking orders that would authorize it to withdraw its current ESP and to implement rates “consistent” with the rates in effect prior to the Commission’s decision implementing the current ESP.¹ In support of its motion seeking to withdraw the current ESP, DP&L claimed that it had the option to withdraw its ESP because the Commission modified and approved its application for the current ESP and that the Supreme Court of Ohio “reversed in total” the Commission’s decision approving the ESP. ESP II, Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter, Memorandum in Support at 1 (“DP&L Motion to Withdraw”). In the other two motions, DP&L sought orders to implement rates that are “consistent” with DP&L’s 2013 rates, asserting that the Commission should grant the motion under R.C. 4928.143(C)(2). ESP II, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 1-2; ESP I, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 1-2 (collectively, “DP&L Motions to Implement Rates”).

¹ DP&L filed the motion to withdraw in the docket of its current ESP. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 12-426-EL-SSO, *et al.*, will be referred to as ESP II or the current ESP. DP&L filed two motions seeking to implement rates consistent with its prior ESP, one in the ESP II docket, and a second in the docket for its first ESP application. *In re the Matter of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 08-1094-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 08-1094-EL-SSO, *et al.*, will be referred to as ESP I or the prior ESP.

Additionally, DP&L asserted that R.C. 4928.141 and 4905.32 require the Commission to permit DP&L to implement “consistent” rates because the Court reversed the order authorizing the current ESP “in total.” See, e.g., ESP I, DP&L Motion to Implement Rates, Memorandum in Support at 2.

On August 1, 2016, DP&L filed a “Notice” setting out the rates that it sought authorization to implement. ESP I, The Dayton Power and Light Company’s Notice of Filing Proposed Tariffs (Aug. 1, 2016). Included in the Notice were tariff sheets that would retain standard service offer generation rates based on the outcomes of the auctions and the nonbypassable transmission rates approved as terms of the current ESP. *Id.* at 2. DP&L further sought authority to bill and collect the nonbypassable Rate Stabilization Charge (“RSC”), a rider that remained in effect in September 2013 over the protests of IEU-Ohio and others. *Id.*; see ESP I, Entry (Dec. 19, 2012).

IEU-Ohio opposed DP&L’s Motion to Withdraw and recommended that the Commission substantially modify the rates that DP&L filed in its Notice if the Commission did permit the withdrawal. ESP II, Memorandum in Opposition to the Motions of the Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates (Aug. 11, 2016). As IEU-Ohio explained in its Memorandum opposing DP&L’s Motions, the Court’s decision required that the Commission issue orders to DP&L to terminate the SSR, but did not permit DP&L to withdraw its ESP application under R.C. 4928.143(C)(2)(a). *Id.* at 4-7. Additionally, the relief that DP&L sought, *i.e.*, to implement rates, terms, and conditions “consistent” with its first electric security plan, is not authorized by Ohio law.² *Id.* at 7-13. Finally, IEU-

² In a separate application for rehearing, IEU-Ohio seeks rehearing of the Commission’s order in the ESP I case permitting DP&L to cherry pick the terms and conditions it seeks to implement.

Ohio moved for an order initiating a proceeding to determine the amount that DP&L unlawfully billed and collected under the unlawful SSR and to reduce rates to return that amount to customers. *Id.* at 4 n.2 (incorporating IEU-Ohio's Comments filed on August 12, 2016).

On August 26, 2016, the Commission modified the order authorizing ESP II to eliminate the SSR. Finding and Order at 5. It then granted DP&L's motion to withdraw its ESP II application. *Id.* at 5-6. According to the Commission, it had "no choice but to grant DP&L's motion and accept the withdrawal of ESP II." *Id.* at 5.

III. ASSIGNMENT OF ERROR I:

The Order permitting the Dayton Power and Light Company to withdraw its electric security plan application is unlawful because the condition permitting the electric distribution utility to withdraw its application under R.C. 4928.143(C)(2)(a) is not satisfied when the Commission eliminates a previously authorized rider as a result of a Supreme Court decision reversing that authorization.

In the Finding and Order, the Commission does not explain what the modification is that requires it to "accept the withdrawal of ESP II," but implies that DP&L filed its motion "in apparent anticipation that the Commission would modify its order or issue a new order" as a result of the Court's decision reversing the authorization of the SSR.³ Finding and Order at 5. The Finding and Order then proceeds to explain that the Commission was required to issue a new order which replaced the reversed order. *Id.* at 5-6, citing *Cleveland Elec. Ill. Co. v. Pub. Utils. Comm'n of Ohio*, 46 Ohio St.2d 105, 116-17 (1976). While the Commission was mandated to terminate the billing and collection of the SSR by the Court's decision, the Commission erred when it apparently

³ As demonstrated in IEU-Ohio's opposition to the motion to withdraw, DP&L's alternative claim that the Commission's modification and approval of the ESP application permits DP&L to withdraw also is without merit. ESP II, Memorandum in Opposition to the Motions of the Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates at 5.

found that its order eliminating the SSR from the current ESP required it to grant DP&L's motion to withdraw under R.C. 4928.143(C)(2)(a).

In relevant part, R.C. 4928.143(C)(2)(a) provides, "If the commission modifies and approves an application under division (C)(1) of [R.C. 4928.143], the electric distribution utility may withdraw its application, thereby terminating it." As the Supreme Court of Ohio has stated, "the clear 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." *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 8 (2015). Thus, the circumstance permitting an electric distribution utility ("EDU") to withdraw its ESP application requires a modification of the application by the Commission.

Once the Court reversed the authorization and the Clerk of the Court issued the mandate, the Commission was required to issue orders directing DP&L to bring its rates into compliance with the Court's order. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n of Ohio*, 46 Ohio St.2d 105, 116-17 (1976); *see, also, Nolan v. Nolan*, 11 Ohio St.3d 1 (1984) (syllabus) ("Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.")

Because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, the Commission order terminating the SSR is ministerial only. "A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done." *State, ex rel. Trauger, v. Nash*, 66 Ohio St. 612, 618 (1902). "[A]

ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts. As such, ministerial duties are necessarily mandatory when required to be performed.” *State v. Moretti*, 1974 Ohio App. Lexis 3838 at *8 (10th Dist. Ct. App. Apr. 9, 1974). When required to perform a ministerial act, the Commission has “no latitude” or discretion in the discharge of that act. *Hamilton Brownfields Redevelopment, LLC, v. Zaino*, 2005 Ohio Tax Lexis 1452 at *7-8 (Bd. Tax. App. Oct. 28, 2005).

Because the Commission was acting in a ministerial capacity, the Commission was without discretion or latitude when it addressed the Court’s order reversing the SSR; it was required to take the actions directed by the Court to eliminate the SSR. By law, the Commission was acting at the direction of the Court.

Because the Commission was acting in a ministerial capacity only, its order eliminating the SSR does not satisfy the statutory requirement that permits an EDU to withdraw its ESP application. That section requires the Commission to modify the application. In this instance, the Commission was directed to terminate the authorization of the SSR and could not take any other action. To the extent there was a modification of ESP II, the Court, not the Commission, ordered the modification. Thus, the requirement of R.C. 4928.143(C)(2)(a) that the Commission modify the ESP application is not satisfied.

In summary, an EDU may withdraw its ESP application only if the Commission modifies and approves the application. When the Commission is acting on a Court order directing the Commission to terminate the authorization of a rider, the

Commission is acting in a ministerial capacity only and has not modified the ESP application within the meaning of R.C. 4928.143(C)(2)(a). Accordingly, the Commission should grant rehearing and reverse its orders granting DP&L's motion to withdraw and dismissing the ESP II case.

IV. ASSIGNMENT OF ERROR II:

The Finding and Order is unlawful because it failed to explain its rationale and respond to contrary positions regarding the request of Industrial Energy Users-Ohio to begin a proceeding to determine an appropriate mechanism to adjust the rates of the Dayton Power and Light Company to account for billing and collection of the unlawful Service Stability Rider.

As part of its response to DP&L's motions, IEU-Ohio sought an order initiating a proceeding to determine the amount that DP&L billed and collected under the unlawful SSR and to establish rate reductions to return that amount to customers. *Id.* at 4 n.2 (incorporating IEU-Ohio's Comments filed on August 12, 2016). As IEU-Ohio demonstrated, the decision of the Supreme Court of Ohio ordering AEP-Ohio to properly account for the amounts it recovered under its unlawful stability rider and the Commission's recent decision permitting AEP-Ohio to bill and collect carrying charges retroactive to the date of the Commission's unlawful change in the carrying charge rate require the Commission to provide the requested relief in this case as well. ESP I, IEU-Ohio Comments at 13-16. Although the request for Commission action to adjust rates prospectively to account for the SSR collections was properly presented to the Commission, the Finding and Order did not identify the request or address the merits of the arguments in support of it. The effect of the order, thus, is to deny the request without explanation.

The Commission is under a requirement to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at." R.C. 4903.09.

Under this requirement, the Commission must “explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 519 (2011). Like the requirement of the federal Administrative Procedure Act that “[t]he record shall show the ruling on each finding, conclusion, or exception presented,” 5 U.S.C. § 557(c), this requirement to address each issue presented is designed “to preserve objections in the record and inform the parties and any reviewing body of the disposition of the case and the grounds upon which the agency’s ‘decision’ is based.” *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir.), *cert. denied*, 400 U.S. 823 (1970).

In this case, the Commission’s failure to address the request to commence a proceeding to address a prospective adjustment to rates does not meet the requirement of R.C. 4903.09. Although IEU-Ohio presented a request to the Commission to initiate a proceeding to account for the amounts billed and collected under the unlawful SSR and prospectively reduce rates, the Commission denied that request without explanation. Having failed to explain its rationale for denying customers relief from the unlawful orders, the Commission erred and should grant rehearing and initiate the requested proceeding.

V. ASSIGNMENT OF ERROR III:

The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful Service Stability Rider and to prospectively adjust the rates of the Dayton Power and Light Company in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission’s failure to initiate such a proceeding is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying

on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and direct that proceedings affording prospective rate relief be initiated.

As noted above, IEU-Ohio sought a Commission order initiating a proceeding to account for the amounts that DP&L billed and collected under the SSR and to prospectively reduce rates. In response to the request of IEU-Ohio for the Commission to initiate a proceeding to determine the amount that was unlawfully collected under the SSR, DP&L, citing *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957) and cases such as *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997) extending *Keco* to Commission proceedings, argued that an order requiring a refund would constitute retroactive ratemaking. ESP II, Reply of the Dayton Power and Light Company in Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates at 21-24 (Aug. 18, 2016) (“DP&L Reply”). By failing to address IEU-Ohio’s request, the Finding and Order implicitly denied it.

The Commission’s denial of the request was in error. To the extent that the Commission denied the request based on *Keco* and the related cases, the Commission should find that *Keco* does not bind the Commission from providing the requested relief. If the Commission determines that its prior decisions extending *Keco* preclude such relief, the Commission (or on review the Supreme Court of Ohio) should overrule the cases extending *Keco* that effectively deny customers relief from the injury caused by the Commission’s unlawful authorization of the SSR.

A. The Court’s decision reversing the authorization of the SSR and recent Commission precedent require the Commission to initiate a

proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount

Despite DP&L's claim that the Commission cannot adjust rates to account for the amounts it billed and collected under the unlawful authorization of the SSR, the Court has implicitly ordered the Commission to initiate such a proceeding. The Commission's failure to comply with the Court's order was in error.

In reversing the Commission's authorization of the SSR, the Court held, "The decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ____." [*Columbus Southern*]. *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490, ¶ 1. Thus, taken in its entirety, the Court's decision directs the Commission to look towards the *Columbus Southern* case to guide the Commission's actions following the reversal of the authorization of the SSR.

In the *Columbus Southern* case, the Commission authorized the Retail Stability Rider ("RSR") for AEP-Ohio. (The RSR and SSR were substantially similar, and the Commission explicitly relied on its rationale for authorizing the RSR when it authorized the SSR. ESP II, Opinion and Order at 17, 22, 25; *see, also, Columbus Southern*, S.Ct. Case No. 2013-521, Merit Brief of Amicus Curiae DP&L in Support of Appellee PUCO at 6 (Oct. 21, 2013) (DP&L asserted that the record supporting AEP-Ohio's RSR "closely resembles" the record supporting its SSR).) However, the Court found that the nature of the RSR served the same purpose as a transition charge and concluded that the authorization of the RSR unlawfully allowed AEP-Ohio to collect transition revenue or its equivalent. *Columbus Southern*, at ¶ 22-25. The Court then directed the Commission on remand to make prospective adjustments to AEP-Ohio's balance of deferred

capacity charges to account for the revenue AEP-Ohio unlawfully collected under the rider. *Id.* at ¶¶ 39-40.

In its decisions reversing DP&L's SSR, the Court followed its decision in the *Columbus Southern* case. By supporting its decision by reference to the *Columbus Southern* case, the Court implicitly directed the Commission to initiate a proceeding to account for the effects of the unlawful SSR and adjust rates accordingly.

Although the Court ordered an adjustment to an existing deferral in *Columbus Southern*, the decision should not be read to limit the scope of the remedy that the Commission may order in this case. As the Commission determined, it may initiate a procedure by which it will prospectively adjust rates to account for the effects of an order subsequently found by the Court to be unlawful. The order establishing the procedure arose in connection with AEP-Ohio's first ESP case.

In an August 1, 2012 order, the Commission prospectively modified the interest rate that was to be applied to the outstanding deferrals from AEP-Ohio's first ESP, reducing the interest rate from 11.15% based on AEP-Ohio's weighted-average cost of capital ("WACC") to 5.34% based on AEP-Ohio's cost of long-term debt. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order (Aug. 1, 2012) ("*AEP PIRR Case*"). Because that modification occurred after the termination of AEP-Ohio's *ESP I Case*, the Court reversed the Commission's order reducing the interest rate and remanded the case to the Commission "for reinstatement of the WACC rate." *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 43.

On May 23, 2016, AEP-Ohio proposed rates that reflected reinstating the 11.15% interest rate as of August 1, 2012, the date the Commission ordered the reduction. On June 29, 2016, the Commission approved AEP-Ohio's rates that reflected resetting interest rates as of August 1, 2012. *AEP PIRR Case*, Entry at 2-3 (June 29, 2016). The Commission noted that "[a]lthough the Court did not specify an effective date for reinstatement of the WACC rate, we find that the Court's decision, taken in its entirety, requires that the WACC rate be reinstated in full, such that AEP Ohio is able to recover its PIRR deferral balance, at the WACC rate, for the entire recovery period." *Id.* That is, in its June 29, 2016 order, the Commission authorized a prospective change to AEP-Ohio's Phase-In Recovery Rider ("PIRR") rates based on a recalculation of revenue lost due to the interest rate reduction between August 1, 2012 and June 29, 2016. In authorizing the prospective change to rates based on revenue lost over the prior four years, the Commission noted that the Court did not "find that *Keco* precluded the collection" of this revenue lost due to the Commission's unlawful action reversed by the Court. *Id.*

These same factors are present here and therefore warrant prospective modifications to DP&L's rates to remedy the collection of approximately \$294 million under the SSR. Taken in its entirety, the Court's decision reversed the SSR, but did not indicate that *Keco* would bar a prospective adjustment of the rates. Based on the Commission's precedent of initiating a proceeding by which rates may be adjusted for the effects of a prior order that the Court has deemed unlawful, the Commission should have granted the relief requested by IEU-Ohio.

Accordingly, the Commission erred when it implicitly denied the request of IEU-Ohio to initiate the proceeding to provide the requested relief to customers. The Commission should grant rehearing and initiate the requested proceeding to account for the amounts that DP&L billed and collected under the unlawful SSR and to prospectively reduce rates based on that accounting.

B. To the extent that the Commission's failure to initiate a proceeding to account for the amounts billed and collected under the unlawful rider and prospectively reduce DP&L's rates to account for the identified amount is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude such a proceeding

DP&L seeks to bill and keep the proceeds it received under the Commission's unlawful authorization of the SSR on the claim that *Keco* precludes the Commission from authorizing prospective rate reductions. As evidenced by two important distinctions between *Keco* and the relief requested in this case, however, *Keco* does not warrant the Commission's refusal to initiate the requested proceeding to account for the amounts billed and collected under the unlawful authorization of the SSR.

First, *Keco* addressed the scope of the remedies available in an action brought before a court of general jurisdiction. As the Court explained in *Keco*, the issue was whether a civil action for restitution based on unjust enrichment would lie to recover an increase in rates charged by a public utility when the order authorizing the increase was subsequently reversed by the Court. *Keco*, 166 Ohio St. at 255-56. To resolve this issue, the Court noted that only it was authorized to review utility rates ordered by the Commission and that the utility was required to charge the rates on file with the Commission. *Id.* at 256-57. The Court further noted that R.C. 4903.16 provided a procedure for suspending rates by posting a bond pending an appeal. Based on that

review of the statutes, the Court concluded the General Assembly had abrogated the common law remedy of restitution for amounts paid under an unlawful Commission order through an action in a general division court. *Id.* at 259. Thus, the express issue addressed in *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court had found to be unlawful. *Keco* did not address the Commission's authority to provide a prospective rate adjustment.

A second substantive distinction between this case and *Keco* is that the plaintiff was seeking restitution. In equity, restitution is awarded to a plaintiff when the defendant has been unjustly enriched at the expense of the plaintiff; it is a remedy designed to restore both parties to their original condition or to return something to the owner of it or the person entitled to it upon the reversal of setting aside of a judgment or order of court under which it was taken from him. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278 (2005); *Wayne Mutual Ins. Co. v. McNabb*, 2016-Ohio-153, ¶ 36 (4th Dist. Ct. App. Jan. 11, 2016); *Black's Law Dictionary* 1477 (1968). In contrast to restitution, the prospective rate relief, which is sought in this case, does not restore individual customers to the place they would have been if the order had not been issued; a rate order reducing DP&L rates may or may not restore individual customers to the position they would have been in. Instead, the requested relief reduces rates to eliminate the effect of the prior unlawful order.

Thus, the *Keco* decision is strictly limited to whether the remedy of restitution will lie as a cause of action in a general division court. IEU-Ohio is seeking relief through a Commission order, and the relief it is seeking is not restitution. Rather, it has requested an order that the Commission initiate a proceeding to account for the effects of the

unlawful SSR and order prospective rate reductions. Accordingly, DP&L's reliance on *Keco* is misplaced.⁴

- C. To the extent that the Commission determines that its prior decisions extending *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to reduce the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and initiate such a proceeding**

In addition to relying on *Keco* to oppose the request of IEU-Ohio for the Commission to initiate a proceeding to account for the amount billed and collected under the unlawful SSR and to reduce rates prospectively to account for that amount, DP&L also relies on several Court and Commission decisions refusing to order refunds that cite *Keco* as the legal basis for that denial. DP&L Reply at 21-22.

As discussed above, the Court has already directed the Commission to initiate a proceeding to account for the amounts billed and collected under the SSR and prospectively adjust rates. If the Commission, nonetheless, is under the mistaken belief that it is required to deny customers the relief to which they are entitled based on the

⁴ The distinction between providing restitution and a prospective adjustment to rates is demonstrated in the Court's reasoning in *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997). In that case, the Commission dismissed a complaint seeking relief from rates that had terminated prior to the filing of the complaint. On appeal, the Court upheld the Commission's decision to dismiss the complaint, noting that the complaint had been filed after the challenged rates had ended. Again, the holding was limited; the Court concluded that R.C. 4905.26 and the rate making statutes did not authorize the Commission to order refunds or service credits to consumers based on expired rate programs. *Lucas County Commissioners*, 80 Ohio St.3d at 347. The Court went on to explain that utility ratemaking is prospective only and that retroactive ratemaking was not permitted. *Id.* at 348.

However, the Court also recognized that rates may be adjusted to recover previously deferred revenue without violating the proscription against retroactive ratemaking. The rate at issue in the *Lucas County Commissioners* case, in contrast, had been discontinued and there was no revenue from the challenged program against which the Commission could balance alleged overpayments or order a credit. *Id.* at 348-49.

In this instance, the Commission can adjust the rates billed and collected by DP&L to account for the amounts that were billed and collected under the unlawful SSR. The rates and charges of an ESP continue. These rates and charges provide a mechanism by which the Commission can balance the overpayments or order a credit. Thus, nothing in *Lucas County Commissioners* dictates a decision denying the initiation of a proceeding to determine the amount that was billed and collected under the unlawful SSR and a prospective adjustment of rates.

cases extending *Keco* to Commission proceedings, it (or on appeal, the Court) should overrule those decisions.

1. **The decisions extending *Keco* are premised on two claims: (1) that *Keco* should be extended to Commission proceedings to prevent the Commission from prospectively adjusting rates to account for an order that has been ruled unlawful by the Court; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates**

According to DP&L, the cases extending *Keco* to Commission proceedings prevent the Commission from refunding of the amounts billed and collected under the unlawful SSR. Under this line of cases extending *Keco* to Commission proceedings, the Court has held that “[n]either the commission nor [the] court can order a refund of previously approved rates.” *Green Cove Resort / Owners’ Assoc. v. Pub. Utils. Comm’n of Ohio*, 103 Ohio St.3d 125, 130 (2004) (citing *Keco*). See, also, *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 516 (2011) and *Ohio Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 121 Ohio St. 3d 362, 367 (2009). Similarly, the Commission has stated that it “cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified.” *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 36 (Oct. 3, 2011). See, also, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry on Rehearing at 6 (June 22, 2000) (citing *Keco*).

Typical of the discussion in the cases extending *Keco* to Commission proceedings is the Court's reasoning in a decision addressing the lawfulness of AEP-Ohio's first ESP. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512 (2011). In that case, the Court found that the Commission had authorized AEP-Ohio to retroactively increase its rates by \$63 million in violation of the *Keco* "rule" prohibiting retroactive ratemaking. *Id.* at 514-15. The Court then held that this finding was a "hollow victory" for customers because *Keco* prohibited the granting of a refund. "Any apparent unfairness ... remains a policy decision mandated by the larger legislative scheme. As *Keco* and other cases have noted, the statutes protect against unlawfully high rates by allowing stays." *Id.* at 516. Thus, the refusal of the Court or the Commission to direct prospective rate adjustments turns on two claims: (1) that the "doctrine" of *Keco* applies to Commission proceedings; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates.

As discussed in the next two sections, neither claim survives examination. Moreover, there is no legitimate interest to sustaining this unreasonable and unworkable "doctrine" that substantially injures utility customers. Accordingly, the Commission (or the Court) should overturn those cases extending *Keco* to Commission proceedings because (1) the decisions were wrongly decided, (2) the decisions defy practical workability, and (3) abandoning the precedents would not create an undue hardship for those who have relied upon them. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 228 (2003).

2. The cases extending *Keco* to prohibit the Commission from prospectively accounting for the effects of an order subsequently found to be unlawful are wrongly decided

As discussed above, the cases denying relief “based on the doctrine set forth in *Keco*,” *Green Cove Resort / Owners Association v. Pub. Utils. Comm’n of Ohio*, 103 Ohio St.3d at 130, extend *Keco* beyond its holding. The Court in *Keco* concluded only that the General Assembly had abrogated the common law remedy of restitution for amounts paid under a Commission-ordered rate after the Court reversed the rate order through an action in a court of general jurisdiction. A decision addressing the scope of the jurisdiction of a court to hear a claim for restitution, however, does not determine the jurisdiction of the Commission or the remedies the Commission may order when the Court has found that a previously authorized rate is unlawful.

The scope of the Commission's authority is governed by Title 49. *Dayton Communications Corp. v. Pub. Utils. Comm’n of Ohio*, 64 Ohio St. 2d 302, 307 (1980). Under R.C. 4928.02, the State Electric Services Policy, the Commission is to “[e]nsure ... reasonably priced electricity.” See, also, R.C. 4928.06(A) (Commission to ensure implementation of R.C. 4928.02). Under R.C. 4905.22, “no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.” Further, the Commission is empowered to determine if any rate or charge is “in any respect unjust, unreasonable, ... or in violation of law” and to remedy that violation. R.C. 4905.26. See, *a/so*, R.C. 4928.16 (providing the Commission with jurisdiction to address compliance with provision of Chapter 4928 under R.C. 4905.26). By law, therefore, the rates imposed by the Commission must be just and reasonable and the Commission has the authority to adjust rates to bring them into compliance with Ohio law.

Although Ohio law requires rates to be just and reasonable, the Commission often has refused to order the rates to be adjusted to account for the amounts billed and collected under the rate the Court has determined to be unlawfully authorized on the ground that it cannot order a “refund.” *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 36 (Oct. 3, 2011). Yet, this Commission and Court-imposed limitation is inconsistent with the statutory authority of the Commission to ensure that rates are just and reasonable, and nothing in Title 49 of the Ohio Revised Code explicitly provides that the Commission cannot initiate a proceeding to provide prospective relief to account for effects of the authorization of a rate increase that the Court has found was unlawful and to prospectively reduce rates.⁵ To the contrary, a failure to adjust rates to account for the effects of a rate subsequently deemed unlawful assures that rates are not just and reasonable, in violation of R.C. 4928.02 and 4905.22.

Further, the Supreme Court has on at least two occasions directed the Commission to adjust rates prospectively to account for the effects of a rate that the Court found to be unlawful. As discussed above, the Court held in *Columbus Southern* that the Commission unlawfully authorized the billing and collection of transition revenue or its equivalent under the guise of a stability rider and ordered the Commission on

⁵ Likewise, R.C. 4905.32 does not prevent the Commission from initiating a proceeding to account for the amounts billed and collected under an unlawful rate and prospectively reduce rates. Under that section, a utility must charge the rates on file with the Commission. There is no provision that prevents the adjustment of rates for the amounts billed and collected under the unlawfully authorized rate. To find otherwise would insert a term that the section also prohibits an order to adjust the existing rate to account for the effects of a prior unlawful order. By inserting an additional implied term, however, the Commission would violate the Court’s longstanding rule that it will not add or subtract words from a statute. *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 515 (2014).

remand to determine the amount and reduce the balance of deferred capacity costs to be billed and collected by AEP-Ohio. *Columbus Southern*, ¶ 40. Similarly, in *Columbus Southern Power Co. v. Public Utilities Commission of Ohio*, 67 Ohio St.3d 535 (1993), the Commission reversed a decision in which the Commission had deferred recovery of amounts found to be lawfully included in rates. The Court then held that the utility may charge to recover previously deferred revenues without violating *Keco* when the recovery was pursuant to rates authorized by an initial Commission order that the Commission had since erroneously limited.

Additionally, the Commission itself recently authorized a prospective change to AEP-Ohio's PIRR rates based on a recalculation of revenue lost due to the interest rate reduction between August 1, 2012 and June 29, 2016. *AEP PIRR Case*, Entry at 7-8 (June 29, 2016). In support of that finding, the Commission found that the Court's decision taken in its entirety required the recalculation for the entire period and that the Court had not found that *Keco* precluded the collection of the amounts that were not collected during the period under which the reversed order was in effect. *Id.* at 7.

Thus, the "doctrine of *Keco*" that prevents prospective relief is not supported by Ohio law. The holding in *Keco* itself is not applicable to Commission proceedings; rather it addresses the remedies available in a court of general jurisdiction and holds that an action for restitution, not prospective rate relief, will not lie. Further, the cases extending *Keco* are inconsistent Ohio legal requirements that authorize Commission review of rates and charges to determine if they are just and reasonable and require the Commission ensure that those rates and charges of a utility are just and reasonable. And despite the "doctrine of *Keco*," the Court and the Commission have found the

Commission may take those actions necessary to correct the effects of a rate found to be unlawful. As this discussion demonstrates, the cases extending *Keco* to deny prospective relief from the effects of an unlawful Commission order are wrongly decided.

3. The extension of *Keco* to prevent rate relief is unworkable under current Commission practice

a. The delay in review amplifies the injury suffered by customers required to pay the rates authorized under an order subsequently found to be unlawful

When the Commission routinely grants rehearing for further consideration and then takes no action on matters for months or years, the parties that have successfully pursued an appeal are afforded little or no remedy when the Commission wrongly applies *Keco*. The dimensions of both the delay and amounts the utilities bill and collect due to the extension of *Keco* are staggering.

Once the Commission issues an order that a party objects to, R.C. 4903.10 dictates the rehearing process a party must follow to challenge the order. A party must initially seek rehearing by the Commission. If a party seeks rehearing and the Commission does not respond to a rehearing application within thirty days, the rehearing application is deemed denied by operation of law. If the Commission does respond to an application for rehearing within the thirty-day window, it may deny or grant the application for rehearing. If the Commission grants rehearing within the thirty-day window,

[the commission] shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in

any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.

While R.C. 4903.10 imposes a thirty-day timeframe on a Commission response to an application for rehearing, the Court has approved a process by which the Commission grants rehearing for the purpose of further consideration. *State ex rel. Consumers' Counsel, v. Pub. Utils. Comm'n of Ohio*, 102 Ohio St.3d 301 (2004). Using this authority, the Commission routinely grants applications for rehearing for the purpose of further consideration. While these grants of rehearing for further consideration are pending, injured parties are prevented from securing relief from the Court until the Commission eventually issues a decision, which often simply rejects any remaining issues.

The delays caused by grants of rehearing for further consideration in this case were substantial. The Commission issued its Opinion and Order in this case on September 4, 2013. (In an Entry Nunc Pro Tunc issued on September 6, 2013, the Commission substantially revised the Opinion and Order.) Parties timely sought rehearing of the SSR on October 4, 2013. The Commission granted rehearing for further consideration of the SSR on October 23, 2013. DP&L then filed tariff sheets to implement the SSR on November 15, 2013, and the Commission approved them in an entry issued on December 13, 2013 even though it had not yet addressed the applications for rehearing on which it had granted rehearing of the lawfulness and reasonableness of the rider. The SSR rate became effective on January 1, 2014, again while the Commission further considered the lawfulness of the SSR. On March 19, 2014, the Commission then issued an entry on rehearing denying the applications for rehearing of IEU-Ohio and OCC. Due to concerns raised in the second entry on

rehearing, IEU-Ohio and OCC each sought rehearing of the second entry on rehearing on April 18, 2014. The Commission again granted rehearing for the purpose of additional consideration on May 7, 2014. On June 4, 2014, the Commission issued its fourth entry on rehearing denying the applications for rehearing of IEU-Ohio and OCC. Due to alleged errors in the fourth entry on rehearing, OCC filed a third application for rehearing on July 1, 2014. That application for rehearing was denied on July 23, 2014. Thus, the Commission granted rehearing for the purpose of reconsideration twice in this case for a total period of approximately six months. During all but two of those months, DP&L billed and collected the SSR.

This case is not unique; delay before the Commission issues an order that may be appealed has become the norm. When the Commission increased AEP-Ohio's electric bills to fund above-market generation-related wholesale capacity payments to its affiliated generation business, for example, the Commission issued five entries granting itself additional time for consideration of issues that consumed nearly three years following the Commission's initial decision. When granting rehearing in each of the five instances, the Commission only said that it was doing so to give itself more time to consider the applications for rehearing and it did so without identifying any additional evidence it would take. The Commission's fifth order granting rehearing for further consideration in response to challenges to the Commission's authority to regulate wholesale electric rates and charges established under federal law, remained open for two months; the first Commission order granting rehearing for further consideration of an application for rehearing filed by AEP-Ohio and challenging the jurisdiction of the Commission to proceed on the merits of the application was "further considered" by the

Commission without resolution for over two years. See *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-COI (entries granting rehearing for additional consideration issued on Feb. 2, 2011, Feb. 2, 2012, Apr. 11, 2012, July 11, 2012, and Aug. 15, 2012). Many of these open matters were not resolved until the Commission issued a decision on October 17, 2012. *Id.*

In the 2011 AEP-Ohio ESP case, the Commission issued an Opinion and Order on August 8, 2012. On October 3, 2012, the Commission granted rehearing for further consideration of claims that the Opinion and Order was unlawful. “Further consideration” continued until January 30, 2013. Meanwhile the contested rate increase became effective on September 1, 2012. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*

While the appellate process itself comes with its own delays, the combination of the rehearing and appellate processes translates into huge customer losses. In this case, the Commission authorized the rider for 36 months at an annual rate of \$110 million a year. Due in part to Commission delay in addressing applications for rehearing, no party was permitted to file a notice of appeal until July 23, 2014 when the Commission issued its Fifth Entry on Rehearing. On August 29, 2014, IEU-Ohio filed its Notice of Appeal. The Court issued its decision on July 20, 2016. Although under a Court mandate to terminate the billing and collection of the SSR, the Commission took no action to suspend the charge until it issued the Finding and Order on August 26,

2016. That Finding and Order and a related one in the ESP I case, however, permitted DP&L to withdraw its current ESP and to delay filing complying tariffs for another seven days. ESP II, Finding and Order at 6; ESP I, Finding and Order at 12. DP&L filed the new tariffs with an effective date of September 1, 2016. Thus, DP&L was permitted to bill and collect unlawful transition revenue or its equivalent under the guise of a stability rider from January 1, 2014 until September 1, 2016. Because the unlawful authorization of the SSR permitted DP&L to bill customers approximately \$9.2 million a month, customers have been billed or will be billed over \$294 million in SSR charges during the 32 months that the SSR was unlawfully authorized.

Large customer losses resulting from the refusal to adjust rates prospectively for the effects of rates found to be unlawful have occurred in other cases as well. In the AEP-Ohio ESP I case, the Court acknowledged that the Commission's order resulted in the illegal collection of \$63 million which would not be returned to customers. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 514 (2011). In a subsequent appeal in the same ESP case following the Commission's refusal to prospectively adjust the phase-in rider to account for all amounts unlawfully authorized in provider of last resort charges, the Court acknowledged that its extension of *Keco* to deny prospective adjustment of rates for the effects of a Commission order permitted AEP-Ohio to benefit from a "windfall" of \$368 million. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 462 (2014).⁶

⁶ In related proceedings, the Commission on remand of its order lowering the carrying charge associated with a rider to recover a deferral balance created by the ESP I order increased AEP-Ohio's recovery over the life of the rider by at least \$130 million. *AEP PIRR Case*, Entry at 7 (June 29, 2016).

b. The Commission refused to stay its unlawful orders, and the stay available under R.C. 4903.16 provides no effective customer relief from the effects of an unlawful authorization of a rate or charge

By seeking a stay either from the Commission or the Court, parties such as IEU-Ohio in this case and others have sought to limit the injury from an order of the Commission that they deemed beyond the Commission's authority while the Commission reconsidered its decision and the appellate process moved forward. The standards under which a party may seek a stay, however, do not provide a workable method of limiting the injury caused by an unlawful Commission order.

The Commission will issue a stay if it finds that there has been a strong showing that a moving party is likely to prevail on the merits, that the party seeking the stay shows that it will suffer irreparable harm if the stay is not granted, that the stay will not cause substantial harm to other parties, and that the stay is otherwise in the public interest. *In the Matter of the Commission's Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003).

Not surprisingly, the Commission is reluctant to find that it has issued an order that is likely to be reversed. In this case, for example, the Commission stated that the parties seeking a stay of the order authorizing the SSR had failed to provide a showing "that there is a reasonable possibility that the Supreme Court of Ohio will reverse or remand the ESP Order. The Commission, therefore, finds that the [parties seeking the stay] have not demonstrated that they are likely to prevail on the merits." Entry at 6 (Oct. 1, 2014). Without providing any details, the Commission then further found that none of the other requirements for a stay was satisfied either. *Id.* The Commission

then defended its authorization of the SSR in the appeal brought by IEU-Ohio and OCC seeking reversal of the authorization. Under these circumstances, seeking a stay to protect customer interests is essentially a futile act: the Commission will not admit that the order it has just issued and is defending in the Supreme Court should be stayed because it was likely wrong.

Alternatively, the Commission may adopt a procedural posture to deny a stay. In this case, for example, it refused to grant a motion to stay the SSR because IEU-Ohio and OCC had initiated an appeal of the Opinion and Order a month after they filed their motion and the “proper venue” for a request for a stay then rested with the Court. *Id.* In denying a stay because an appeal has been filed, however, the Commission ignores that the stay from the Court is nearly impossible for a customer to secure.

Under R.C. 4903.16, an appellant may seek a stay from the Supreme Court of a challenged rate during the pendency of an appeal if it can satisfy a security requirement. Due to the magnitude of the monetary claims associated with cases involving electric utilities, however, the security requirement is beyond the means of all parties except the utilities themselves. See *State ex rel. Industrial Energy Users-Ohio, v. Pub. Utils. Comm’n of Ohio*, 135 Ohio St.3d 367 (2013) (Pfeiffer, J., dissenting).

Based on Commission practice and the bonding requirements of Ohio law, a rule that prevents prospective relief from an unlawful order leaves customers unprotected and is unworkable. Customers are required to pay unlawfully high rates with no expectation that they will recover the excessive amounts or a means of cutting off the charges while they challenge the unlawful rates. A less fair or workable outcome would be difficult to conceive.

4. No party would suffer undue hardship if the Commission initiates a proceeding to prospectively adjust the rates of the Dayton Power and Light Company to account for amounts unlawfully billed and collected under the unlawful SSR from January 1, 2014

No legitimate reliance interest is jeopardized if the Commission initiates a proceeding to prospectively adjust the rates of DP&L to account for the amounts unlawfully billed and collected under the unlawful SSR.

Customers, on the one hand, have been burdened by the unlawful charge for nearly three years, all the while complaining that the authorization of the SSR plainly violated the bar on the collection of transition revenue or its equivalent. They are entitled and have a reasonable expectation to meaningful relief now that their claims have been endorsed by the Court.

On the other hand, DP&L had no reasonable expectation that it could bill the unlawful SSR revenue. As presented to the Commission, the SSR that DP&L proposed was to provide DP&L with above-market revenue in violation of the statutory prohibition on the authorization of transition revenue or its equivalent after the Market Development Period. That prohibition, R.C. 4928.38, has been in effect since 1999. DP&L could not have any legitimate expectation that it could retain the revenue it collected in violation of that prohibition.

Further, the Court has ordered prospective rate relief at least since the 1993 *Columbus Southern* case.

Moreover, the requirement to adjust rates prospectively to account for amounts charged under rates subsequently determined to be unjust or unreasonable would not be new, even to the Ohio utilities. Under federal law, utilities or their affiliates are subject to refund requirements. See Federal Power Act §§ 206 and 309.

Under these circumstances, there is no individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

5. The failure to provide an effective remedy when the Commission imposes illegal charges violates the Ohio Constitution

Under section 16 of Article I of the Ohio Constitution, "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy in due course of law, and shall have justice administered without denial or delay."

The failure to prospectively adjust rates to account for the effects of an unlawful authorization operates to deny customers a remedy for the injury done to them. Under the illegal rates, customers are first required to pay unjust and unreasonable charges while they wait for a final order from which they can seek review by the Supreme Court. If they survive the long delays imposed by the Commission and successfully prosecute an appeal, they are then afforded no relief for the injury incurred. This result violates the constitutional requirement that every person have a remedy in due course of law.

6. To the extent the Commission or the Supreme Court determines that *Keco* and the cases following it do not authorize the Commission to initiate a proceeding and prospectively order that rates be adjusted to account for the amounts billed and collected under the unlawful SSR, the Commission or the Court should overrule the cases extending *Keco*

In summary, the Commission should overrule those decisions extending *Keco* if the Commission is relying on them to deny customers relief in this case.

Initially, the Commission decisions extending *Keco* to preclude a Commission proceeding to address prospectively the rates of a utility were wrongly decided. Specifically, *Keco* did not address the jurisdiction of the Commission to prospectively adjust rates to account for effects of a Commission order that has been reversed by the Court; rather, the decision held that an equitable remedy could not be pursued in a court of general jurisdiction. At the same time, the Court has recognized that the Commission can provide prospective relief, and the Commission has on occasion applied that authority.

Further, the Commission's error in extending *Keco* into a limitation on its own authority does not conform to the statutory requirements of Title 49 of the Ohio Revised Code. Both R.C. 4905.22 and 4928.02 require that the Commission ensure that rates are just and reasonable. Extension of *Keco* to deny prospective customer relief after the Court has held that a Commission order is unlawful has the effect of affording a "windfall" based on an unlawful order. Assuring a windfall to the party whose claim has been found to be unlawful is the antithesis of a just and reasonable result.

Second, the Commission's application of *Keco* defies practical workability and inflicts serious financial injury on the innocent party. Although parties have thirty days to seek rehearing and the Commission has thirty days to rule on those applications, in practice the Commission with the Court's endorsement has granted rehearing for further review and then taken no action on the grant of rehearing for extended periods, sometimes years. While the review process slowly moves forward, securing a stay of the unlawful order from either the Commission or the Court is a practical impossibility. During this delay, customers are often required to pay illegally excessive rates to secure

vital electric services. When those same customers successfully secure an order from the Court reversing the Commission's unlawful decision to increase their rates, the Commission's extension of *Keco* to deny prospective relief permits the losing party to reap the rewards of an unlawful Commission order. A less workable or fair result is difficult to conceive, but it is the outcome produced by the Commission's review process and the extension of *Keco* to deny prospective relief from the effects of an order subsequently determined to be unlawful.

Third, abandoning the *Keco*-based precedents would not create an undue hardship for those who have relied upon it. Ohio customers would see an improvement in their lot as they are seldom the beneficiaries of the existing regulatory scheme. Moreover, providing rate relief to customers for the effects of an unlawful rate authorization would not be new, even to the Ohio utilities. Prior Court decisions and federal law already provide for such relief. Under these circumstances, therefore, there is no legitimate individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

Further, reversal of the cases extending *Keco* would prevent violations of due process by providing a remedy for the injury inflicted by an unlawful Commission order.

In summary, the cases extending *Keco* that DP&L is relying upon to argue that the Commission should not initiate a proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount should be overruled. Because the cases are wrongly decided, unworkable in practice, and harmful in result, the Commission (or the Court) should

“right that which is clearly wrong.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d at 232 (Moyer, C.J., concurring).

VI. CONCLUSION

For the reasons stated above, the Commission should grant rehearing, reverse its order dismissing this case, and initiate a proceeding to prospectively adjust DP&L’s rates to account for the effects of the SSR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 26th day of September 2016, *via* electronic transmission.

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Summary: App for Rehearing Industrial Energy Users-Ohio's Application for Rehearing electronically filed by Ms. Vicki L. Leach-Payne on behalf of Darr, Frank P. Mr.