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

JOINT APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP AND THE KROGER COMPANY

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) and the Kroger Company (Kroger) (collectively, Joint Applicants) hereby respectfully request rehearing of the Public Utilities Commission of Ohio's (Commission) August 26, 2016 Finding and Order (Order) issued in the above-captioned matters. The Joint Applicants contend that the Order is unlawful, unjust, and unreasonable in the following respects:

1. The Commission erred in ruling that the Supreme Court of Ohio reversed DP&L's ESP 2 in its entirety. Context shows that the Supreme Court of Ohio's decision in *In re Application of Dayton Power & Light Co.*, Slip Opinion 2016-Ohio-3490 was limited to reversing DP&L's SSR.

2. The Commission erred in finding that the removal of an unlawful provision of an ESP pursuant to a Supreme Court of Ohio ruling is tantamount to a modification to an ESP by the Commission. Under R.C. 4928.143(C)(2)(a), the withdrawal provision is triggered only by a Commission-ordered modification.

3. The Commission erred in finding that an electric distribution utility retains an everlasting right to terminate its ESP. Under Commission precedent, an electric distribution utility forfeits this right by filing tariffs in compliance with the Commission's modifications.

For these reasons, and as further explained in the Memorandum in Support attached hereto, the Joint Applicants respectfully request that the Commission grant this Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction.

The Commission's Order authorizing the Dayton Power & Light Co. (DP&L) to withdraw its application for a second electric security plan (ESP 2),[1] thereby terminating the ESP 2, should be reversed for at least three reasons.[2] First, the Commission's statement that the Supreme Court of Ohio reversed DP&L's ESP 2 in its entirety ignores important contextual

[1] Order at ¶ 17.

[2] Contemporaneous with this filing, OMA and Kroger are also filing a Joint Application for Rehearing in Case No. 08-1094-EL-SSO, et al., where the Commission authorized DP&L to implement certain tariff provisions from its ESP 1 and ESP 2.

considerations. Accounting for the underlying context in which the Court's decision arose compels the conclusion that the Court's decision was limited solely to reversing the Commission's authorization of DP&L's Service Stability Rider (SSR). Second, in contravention of R.C. 4928.143(C)(2)(a), the Commission's Order impermissibly treats a Court-ordered reversal of an ESP provision as having the same effect as a Commission-ordered modification to an ESP upon approval or unilaterally after the ESP has been approved. Under R.C. 4928.143(C)(2)(a), however, an electric distribution utility (EDU) may only withdraw and terminate an ESP application to the extent the modification is ordered by the Commission, not the Court. Third, the Commission's Order sets a troubling precedent that permits an EDU to terminate an ESP following an adverse Court ruling even if, in the case of DP&L, the EDU has been operating under and collecting charges through the ESP for almost three years.

For these reasons and as further articulated below, the Commission's Order should be reversed on rehearing.

II. Discussion.

A. The Commission erred in ruling that the Supreme Court of Ohio reversed DP&L's ESP 2 in its entirety. Context shows that the Supreme Court of Ohio's decision in *In re Application of Dayton Power & Light Co.*, Slip Opinion 2016-Ohio-3490 was limited to reversing DP&L's SSR.

Contrary to the Commission's assertion, the Court did not reverse in its entirety the Commission's approval of DP&L's application for its ESP 2 as modified.[3] Rather, the Court reversed the Commission's authorization of DP&L's SSR because the SSR permitted the collection of transition revenue or its equivalent in violation of R.C. 4928.38.

The Court's decision on DP&L's ESP 2 provides in its entirety that "The decision of the [Commission] is reversed on the authority of *In re Application of Columbus S. Power Co.*,

[3] Order at ¶ 6.

___Ohio St.3d___, 2016-Ohio-1608,___N.E.3d___."[4] The Commission concedes that this sentence reflects the Court's pronouncement from *In re Application of Columbus S. Power Co.* that "financial integrity charges provide utilities with the equivalent of transition revenue in violation of R.C. 4928.38."[5] Thus, following the Commission's own understanding of the meaning of *In re Application of Columbus S. Power Co.*, the Commission should have held that the Court's decision on DP&L's ESP 2 was limited to reversing the SSR because it provided DP&L with the equivalent of transition revenue in violation of R.C. 4928.38.

That conclusion is bolstered by the appeal of DP&L's ESP 2 to the Court. The central issue presented for the Court's consideration was whether the SSR impermissibly authorized DP&L to collect transition revenue or its equivalent. IEU-Ohio and the Office of the Ohio Consumers' Counsel (OCC) relied heavily on *In re Application of Columbus S. Power Co.* to make this point.[6] Moreover, the focal point of oral argument centered on whether the SSR licensed the collection of transition revenue or its equivalent.[7]

Collectively, these factors give important context to the Court's decision on DP&L's ESP 2 and demonstrate that the Court's decision was limited solely to reversing the Commission's authorization of DP&L's SSR, not the entirety of the ESP 2. The Commission's contrary conclusion cannot be squared contextually. On rehearing, the Commission should find that the Court's reversal was limited to the Commission's approval of DP&L's SSR.

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

[5] Order at ¶ 10.

[6] Joint Motion of IEU-Ohio and OCC to Vacate 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, Supreme Court of Ohio Case No. 2014-1505 (May 12, 2016).

[7] 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.

B. The Commission erred in finding that the removal of an unlawful provision of an ESP pursuant to a Supreme Court of Ohio ruling is tantamount to a modification to an ESP by the Commission. Under R.C. 4928.143(C)(2)(a), the withdrawal provision is triggered only by a Commission-ordered modification.

The Commission's Order impermissibly treats a Court-ordered reversal of an unlawful provision of an ESP as having the same effect as a Commission-ordered modification to an ESP. That interpretation cannot be reconciled with the governing statute.

Under R.C. 4928.143(C)(2)(a), an EDU may terminate and withdraw its application for an ESP "[i]f the *[C]ommission* modifies and approves an application" for that ESP.[8] Notably, that language does not grant an EDU the right to terminate and withdraw its ESP application in response to an unfavorable *Court* ruling. While it is true that a Court decision is not self-executing and that the Commission must take steps on remand to implement the Court's directive,[9] it cannot be ignored that the sole motivation for why DP&L filed its application to withdraw and terminate its ESP 2 resulted from the Court's decision which reversed the Commission's authorization of the SSR.[10] That scenario is not contemplated by R.C. 4928.143(C)(2)(a) and thus the Commission has no power to authorize DP&L to terminate and withdraw its ESP 2 under the circumstances.

The Commission's erroneous interpretation of R.C. 4928.143(C)(2)(a) violates the foundational principle of statutory interpretation that prohibits the insertion or deletion of words not found in the statute.[11] Specifically, the Commission's reading of R.C. 4928.143(C)(2)(a) would have the result of adding language permitting an EDU to withdraw and terminate its ESP in response to a Court ruling. That outcome flouts longstanding interpretive principles. On

[8] Emphasis added.

[9] *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976).

[10] DP&L Motion to Withdraw its Application, Memo. in Support at 1 (July 27, 2016).

[11] *In re Application of E. Ohio Gas Co.*, 141 Ohio St.3d 336, 2014-Ohio-3073, ¶ 28.

rehearing, the Commission should ground its Order in the language of the statute and hold that DP&L cannot move to terminate and withdraw its ESP 2 simply in response to an adverse Court ruling.

C. The Commission erred in finding that an electric distribution utility retains an everlasting right to terminate its ESP. Under Commission precedent, an electric distribution utility forfeits this right by filing tariffs in compliance with the Commission's modifications.

The Commission's ruling permits DP&L to withdraw and terminate its ESP 2 even though DP&L has been implementing tariff provisions favorable to DP&L and collecting charges under the ESP 2 for almost three years. If allowed to stand, the Commission's holding effectively grants an EDU a veto power over any unfavorable ESP-related Court ruling that the EDU suffers on appeal. To illustrate, if the Court reverses any provision in an ESP as unlawful, unjust, or unreasonable that is unfavorable to the EDU, the EDU can simply counteract the ill effects of that decision by filing a motion with the Commission to withdraw its ESP and request to revert back to its prior ESP. That outcome is not only troubling for the purposes of this case,[12] but also for future cases where similar issues will undoubtedly arise. In order for customers to derive value from Court victories, an EDU should not be permitted to exercise veto power over a Court ruling that it views as unfavorable.

It is true that R.C. 4928.143(C)(2)(a) does not expressly establish a cutoff date for when an EDU may move to withdraw and terminate an ESP application in response to a Commission-ordered modification. Nonetheless, Court precedent dictates that if the Commission makes a modification to an ESP and the EDU is willing to accept that modification and implement the

[12] As the Joint Applicants explain in their separate Application for Rehearing filed in Case No. 08-1094-EL-SSO, et al., DP&L's withdrawal and termination of it ESP 2 has enabled it to resurrect the seemingly-defunct Rate Stabilization Charge (RSC) from its ESP 1. Resurrection of the RSC negates the victory that customers thought they had received from the Court's decision which reversed the Commission's authorization of the SSR.

modified ESP, R.C. 4928.143(C)(2)(a) does not apply.[13] Moreover, the Commission's own precedent establishes that an EDU's implementation of tariffs that incorporate the Commission's modifications to an ESP will be construed as an acceptance of those modifications.[14] Here, DP&L accepted the Commission's modifications set out in the Commission's September 4, 2013 Opinion and Order when it collected charges and implemented tariff provisions consistent with those modifications for almost three years. Under the Commission's precedent, DP&L therefore accepted those modifications and correspondingly forfeited any right it once had to withdraw and terminate its ESP 2. A subsequent Court reversal of an unlawful provision of the modified ESP that the Commission and EDU must implement does not constitute a Commission modification that triggers R.C. 4928.143(C)(2)(a).

Apart from the circumstances of this case, broader problems exist with the Commission's Order. The Commission's interpretation of R.C. 4928.143(C)(2)(a) sets up an untenable result, which allows a utility to have veto power over any unfavorable ESP-related ruling from the Court. This outcome dilutes the potency of the direct right of appeal granted by R.C. 4903.13 and removes much of the incentive that exists for customers to vindicate their interests before the Court. A situation that effectively allows an EDU to override an ESP-related Court ruling by moving to withdraw and terminate an ESP also brings needless instability to the regulatory environment, complicates the ability of customers to accurately manage their budgets, upsets important reliance interests, and thwarts due process. For all these reasons, the Commission

[13] *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 26 ("If the commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application.").

[14] *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); *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).

should reverse its Order and hold that DP&L forfeited its right to withdraw and terminate its ESP 2 when it accepted the Commission's modifications for almost three years.

III. Conclusion.

The Joint Applicants respectfully request that the Commission grant this Application for Rehearing as set forth above.

Respectfully submitted,

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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 September 26, 2016.

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Case No(s). 12-0426-EL-SSO, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR

Summary: Application Joint Application For Rehearing Of The Ohio Manufacturers' Association Energy Group And The Kroger Company electronically filed by Debra A Gaunder on behalf of Ohio Manufacturers' Association Energy Group