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**VIA E-FILE**

September 26, 2016

Public Utilities Commission of Ohio  
PUCO Docketing  
180 E. Broad Street, 10th Floor  
Columbus, Ohio 43215

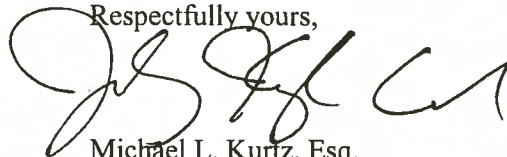
**In Re: Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC, 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, and 12-672-EL-RDR**

Dear Sir/Madam:

Please find attached the APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF THE OHIO ENERGY GROUP for filing in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,



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Kurt J. Boehm, Esq.  
Jody Kyler Cohn, Esq.  
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MLKkew

Cc: Certificate of Service

**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
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	:	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
	:	
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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
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In the Matter of the Application of Dayton Power And Light Company For Approval of Its Electric Security Plan.	:	Case No. 12-426-EL-SSO
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	:	
In the Matter of the Application of Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 12-427-EL-ATA
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In the Matter of the Application of Dayton Power And Light Company For Approval of Certain Accounting Authority.	:	Case No. 12-428-EL-AAM
	:	
	:	
In the Matter of the Application of Dayton Power And Light Company For Waiver of Certain Commission Rules.	:	Case No. 12-429-EL-WVR
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	:	
In the Matter of the Application of Dayton Power And Light Company to Establish Tariff Riders.	:	Case No. 12-672-EL-RDR
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**APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP**

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Energy Group (“OEG”) submits this Application for Rehearing of the Finding and Orders (“Orders”) issued by the Public Utilities Commission of Ohio (“Commission”) in the above-captioned dockets on August 26, 2016. OEG submits that the Orders are unlawful and unreasonable because:

- 1) The Commission erred by finding that the Supreme Court of Ohio (“Court”) reversed the Commission’s entire decision with respect to The Dayton Power and Light Company’s (“DP&L” or “Company”) 2016 Electric Security Plan (“ESP”).
- 2) The Commission erred by allowing DP&L to withdraw its 2016 ESP in violation of R.C. 4928.143(C)(2)(a).
- 3) The Commission misapplied R.C. 4928.143(C)(2)(b) by selectively retaining elements of DP&L’s 2016 ESP.
- 4) The Commission erred by failing to address OEG’s request for a refund of the unlawful transition revenues collected by DP&L through the Service Stability Rider (“SSR”) since that rider’s inception.

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,



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September 26, 2016

**COUNSEL FOR OHIO ENERGY GROUP**

**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
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In the Matter of the Application of Dayton Power And Light Company For Approval of Its Electric Security Plan.	:	Case No. 12-426-EL-SSO
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In the Matter of the Application of Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 12-427-EL-ATA
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In the Matter of the Application of Dayton Power And Light Company For Approval of Certain Accounting Authority.	:	Case No. 12-428-EL-AAM
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In the Matter of the Application of Dayton Power And Light Company For Waiver of Certain Commission Rules.	:	Case No. 12-429-EL-WVR
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	:	
In the Matter of the Application of Dayton Power And Light Company to Establish Tariff Riders.	:	Case No. 12-672-EL-RDR
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**MEMORANDUM IN SUPPORT**

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**I. The Commission Erred By Finding That The Supreme Court Of Ohio Reversed The Commission’s Entire Decision With Respect To DP&L’s 2016 Electric Security Plan.**

Contrary to the Commission’s interpretation, the Court did not reverse the entire Opinion and Order approving the DP&L’s 2016 ESP.<sup>1</sup> In addressing the limited legal challenges to DP&L’s 2016

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<sup>1</sup> Finding and Order, Case Nos. 12-426-EL-SSO *et al* (“2012 Case Order”) at 4 (citing *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016)).

ESP, the Court was concise, stating: “[t]he decision of the Public Utilities Commission is reversed on the authority of *In re Application of Columbus S. Power Co....2016- Ohio-1608...*”<sup>2</sup> Hence, the scope of the Court’s decision with respect to DP&L’s 2016 ESP was limited by its findings in the *Columbus S. Power Co.* case (the “AEP Ohio ESP Appeal”).

The vast majority of the Court’s decision in the AEP Ohio ESP Appeal was dedicated to addressing Ohio Power Company’s (“AEP Ohio”) “*financial integrity*” charge – the Retail Stability Rider (“RSR”).<sup>3</sup> The Court found that a “*financial integrity*” charge such as the RSR provided the utility with “*the equivalent of transition revenue*” in violation of R.C. 4928.38.<sup>4</sup> The Court reversed and remanded the part of the Commission’s decision approving the RSR, ordering the Commission to determine the amount of unlawful “*transition revenue*” that AEP Ohio had collected from customers through the RSR and to refund that amount to customers on remand through an offset to its current RSR charge.<sup>5</sup> The only other part of the AEP Ohio’s ESP reversed and remanded to the Commission concerned the utility’s significantly excessive earnings test threshold.<sup>6</sup> Aside from those two components reversed by the Court, the remainder of the AEP Ohio’s ESP stayed intact.

Given the limited scope of the Court’s decision in the AEP Ohio ESP Appeal, the Court’s citation to that case as the sole basis for its decision on DP&L’s 2016 ESP can have only one meaning: that DP&L’s SSR, which is a “*financial integrity*” charge equivalent to AEP Ohio’s RSR, similarly provides DP&L with unlawful transition revenue and is therefore barred by R.C. 4928.38. But no aspect of the Court’s limited AEP Ohio ESP Appeal decision provides a rationale upon which to reverse all of the non-SSR components of DP&L’s 2016 ESP. For example, in DP&L’s 2016 ESP, the Commission approved a competitive bidding process and master supply agreement,<sup>7</sup> changes to the Alternative

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<sup>2</sup> Id. (emphasis added).

<sup>3</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608.

<sup>4</sup> Id. at ¶25.

<sup>5</sup> Id. at ¶40.

<sup>6</sup> Id. at ¶66.

<sup>7</sup> Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 16.

Energy rider true-up process,<sup>8</sup> Reconciliation Riders,<sup>9</sup> bifurcation of the Transmission Cost Recovery Rider,<sup>10</sup> competitive retail enhancements,<sup>11</sup> and an Economic Development Fund.<sup>12</sup> Nowhere in the AEP Ohio ESP Appeal is there language that could reasonably be interpreted as reversing these components of DP&L's 2016 ESP. Consequently, the Commission's finding that the *entire* 2016 ESP Order was reversed on the basis of the AEP Ohio ESP Appeal is unfounded.

## II. The Commission Erred By Allowing DP&L To Withdraw Its 2016 ESP In Violation of R.C. 4928.143(C)(2)(a).

The Commission misapplied R.C. 4928.143(C)(2)(a) when it allowed DP&L to withdraw the Electric Security Plan initially approved in Case Nos. 12-426-EL-SSO *et al* (the "2016 ESP") and to reinstate most of the ESP approved in Case Nos. 08-1094-EL-SSO *et. al* (the "2008 ESP") in its place.<sup>13</sup>

R.C. 4928.143(C)(2)(a) provides:

*If the **commission** modifies and approves **an application** under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.*<sup>14</sup>

The right of a utility to withdraw an ESP under R.C. 4928.143(C)(2)(a) is intended to address circumstances under which a *proposed* ESP application is modified by the *Commission*.

Here, the circumstances at issue were vastly different than those envisioned by the Legislature in enacting R.C. 4928.143(C)(2)(a). DP&L's 2016 ESP was not merely a proposal. Rather, that ESP was the result of a final, appealable Commission order, as the Company itself conceded.<sup>15</sup> And the Commission did not *voluntarily* modify DP&L's 2016 ESP. Rather, the only modifications required –

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<sup>8</sup> Id. at 31.

<sup>9</sup> Id. at 35.

<sup>10</sup> Id. at 36.

<sup>11</sup> Id. at 38.

<sup>12</sup> Id. at 42.

<sup>13</sup> 2012 Case Order at 4-6; Finding and Order, Case Nos. 08-1094-LE-SSO *et al* at ("2008 Case Order") at 7-11.

<sup>14</sup> Emphasis added.

<sup>15</sup> Fifth Entry on Rehearing, Case Nos. 12-426-EL-SSO *et al* (July 23, 2014); Notice of Cross-Appeal of the Dayton Power and Light Company (September 19, 2014) at 2 ("*Consequently, the Commission's ESP Orders are now final and appealable.*").

immediate cessation of the SSR during the 2016 ESP period and a refund of previously collected SSR charges - were entirely the result of the Court's mandate and therefore involuntary on the part of the Commission. Accordingly, given that DP&L's requests strayed far from the situation contemplated by the plain language R.C. 4928.143(C)(2)(a), that statute was not a basis upon which to approval withdrawal of its 2016 ESP.

A utility's statutory right to withdraw an ESP does not extend indefinitely. That right does not apply when the utility accepts a Commission-modified ESP by allowing that ESP to go into effect and then the Commission's final order is later modified by the Court. The law gives the utility a limited "veto" right over Commission modifications of a proposed application; it does not give the utility a "veto" right over decisions of the Court.

Once the 2016 ESP was subject to a final, appealable Commission order and DP&L allowed the ESP to go into effect, the Company could no longer invoke R.C. 4928.143(C)(2)(a) to withdraw that ESP. Allowing the Company to do so undermines the statutory appellate process provided for under R.C. 4903.13. The utility's statutory right to withdraw a proposed ESP must be read in concert with the other parties' statutory right to appeal a final Commission order and to receive the full relief ultimately provided by the Court. *"All statutes relating to the same general subject matter must be read in pari material, and in construing these statutes in pari material, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes."*<sup>16</sup> The best way to harmonize those two statutes is to bar a utility from invoking R.C. 4928.143(C)(2)(a) after the date upon which the Commission issues a final appealable order on the utility's proposed ESP and the utility has accepted the Commission's modifications by allowing the ESP to go into effect.

In 2015, the Court stated that *"[i]f 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*

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<sup>16</sup> *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131).

*application.*”<sup>17</sup> But the Court has never stated that a utility is entitled to thwart the Court’s appellate mandate by withdrawing its ESP after receiving an unfavorable decision from the Court.

Approving DP&L’s requests renders the appellate process ineffective and puts this Commission on a collision course with the Court. Reinstatement of most of DP&L’s 2008 ESP simply replaces one unlawful “*financial integrity*” charge (the SSR) with another (the Rate Stabilization Charge included in DP&L’s 2008 ESP). The cursory nature of the Court’s remand order seems to demonstrate a certain amount of frustration with the Commission’s recent handling of ESP matters. That frustration will only grow if the Court is effectively ignored in this instance. Approving DP&L’s attempted end-run around the Court’s recent decision substantially harms customers by forcing them to continue to pay unlawful transition revenues in direct contravention of the Court’s mandate, unjustly enriching DP&L’s corporate parent, Virginia-based AES.

### **III. The Commission Misapplied R.C. 4928.143(C)(2)(b) By Selectively Retaining Elements of DP&L’s 2016 ESP.**

While the Commission invoked R.C. 4928.143(C)(2)(b) to reinstate most of DP&L’s 2008 ESP, the Commission did not restore every aspect of that ESP as directed by the statute. Instead, the Commission established a new hybrid ESP, which deviated, at a minimum, from DP&L’s 2008 ESP by: 1) allowing DP&L to recover competitive bid process energy and capacity costs through base generation rates and setting the fuel rider to zero, excluding amount being reconciled from prior periods; and 2) retaining the Company’s current transmission cost recovery riders.<sup>18</sup> The Commission’s decision misapplied R.C. 4928.143(C)(2)(b). The latter statute provides:

*If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected*

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<sup>17</sup> *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056 at ¶26 (emphasis added).

<sup>18</sup> 2008 Case Order at 8-10.



*increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.*

Hence, the Commission is barred from selectively choosing which portions of a prior ESP will be reinstated and which will be overridden by components of a subsequent ESP. If an ESP is withdrawn pursuant to R.C. 4928.143(C)(2)(a), the Commission must simply reinstate the previous ESP with adjustments for expected fuel costs increases or decreases. The Commission seems aware of this statutory limitation on its authority, seeking to recharacterize competitive bidding process costs as “*fuel costs*” in order to fit that portion of its decision within the parameters of R.C. 4928.143(C)(2)(b).<sup>19</sup> But the costs associated with the competitive bidding process are much more than “*fuel costs*” since they reflect all of the costs of energy and capacity needed to serve non-shopping customers. And the statute’s allowance of adjustments for “*fuel costs*” cannot be extended to grant the Commission authority for its decision to retain DP&L’s current transmission riders. Accordingly, the Commission exceeded its statutory authority when it crafted a new hybrid ESP to replace DP&L’s 2016 ESP.

#### **IV. The Commission Erred By Failing To Address OEG’s Request For A Refund Of The Unlawful Transition Revenues Collected By DP&L Through The SSR Since That Rider’s Inception.**

In its Memorandum Contra, OEG argued that the Court’s recent decisions require the Commission to order a refund of all SSR charges paid by customers to DP&L since September 4, 2013, when the SSR was initially approved by the Commission.<sup>20</sup> OEG further explained that the Court found no conflict between such a remedy and the retroactive ratemaking principles set forth in *Keco Industries, Inc. v. Cinci. & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957). Yet the Commission completely failed to address this argument. The Commission cannot simply ignore material arguments

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<sup>19</sup> Id. at 8.

<sup>20</sup> OEG Memorandum Contra at 5 (citing *See In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (June 20, 2016) and Opinion and Order, Case Nos. 12-426-EL-SSO *et al* (September 4, 2013) at 25).

raised by parties.<sup>21</sup> The Commission should therefore grant rehearing to consider and approve OEG's requested refund.

Respectfully submitted,



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September 26, 2016

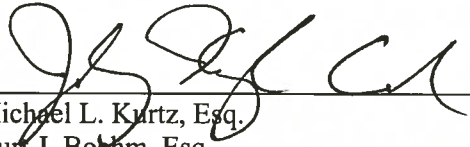
**COUNSEL FOR OHIO ENERGY GROUP**

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<sup>21</sup> *In re Comm Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607 at ¶51 (“AEP is correct that the commission failed to address its arguments in any substantive manner. Accordingly, we remand the cause to correct this error.”).

**CERTIFICATE OF SERVICE**

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 26<sup>th</sup> day of September, 2016 to the parties listed on the attached Certificate of Service.



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Summary: App for Rehearing Ohio Energy Group (OEGs) Application for Rehearing and Memorandum in Support electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group