BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.	)))))	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))))	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	))))	Case No. 08-1097-EL-UNC

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

Joel E. Sechler (0076320)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
sechler@carpenterlipps.com
ghiloni@carpenterlipps.com

Counsel for OMA

Ryan P. O'Rourke (0082651)
Carpenter, Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
o'rourke@carpenterlipps.com

Counsel for Kroger

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

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association (OMA) 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 authorizing DP&L to blend provisions from its ESP 1 and its ESP 2. Under R.C. 4928.143(C)(2)(b), the Commission cannot blend provisions from multiple ESPs together.

2. The Commission erred in permitting DP&L to resurrect the Rate Stabilization Charge. The Rate Stabilization Charge is an unlawful transition charge under R.C. 4928.38 and an unlawful POLR charge.

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,

/s/ Joel E. Sechler
Joel E. Sechler (0076320)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
sechler@carpenterlipps.com
Ghiloni@carpenterlipps.com

Counsel for OMA

/s/ Ryan P. O'Rourke
Ryan P. O'Rourke (0082651)
Carpenter, Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
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MEMORANDUM IN SUPPORT

I. Introduction.

The Commission's Order authorizing the Dayton Power & Light Co. (DP&L) to partially revert to the provisions from its first electric security plan (ESP 1) after granting DP&L's motion to withdraw its ESP 2 is unlawful, unjust, and unreasonable and, therefore, should be reversed on rehearing.[1] First, the Commission's Order violates R.C. 4928.143(C)(2)(b) because it permits DP&L to blend provisions from its ESP 1 and its ESP 2 after withdrawing its ESP 2. Even assuming that DP&L could withdraw its ESP, contrary to the Order, when an electric distribution utility (EDU) permissibly withdraws and terminates an ESP, the statute directs the Commission to continue the provisions from the prior ESP; it does not permit an EDU to implement

[1] Contemporaneous with this filing, OMAEG and Kroger are also filing a Joint Application for Rehearing in Case No. 12-426-EL-SSO, et al., where the Commission authorized DP&L to withdraw its ESP 2.

provisions from two prior ESPs at its discretion. Second, the Commission erred in permitting DP&L to resurrect the once-defunct Rate Stabilization Charge (RSC). The RSC not only licenses the collection of impermissible transition revenue or its equivalent, it also cannot be justified as a provider-of-last-resort (POLR) charge given that DP&L competitively bids the POLR responsibility when establishing its generation pricing.

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

II. Discussion.

A. The Commission erred in authorizing DP&L to blend provisions from its ESP 1 and its ESP 2. Under R.C. 4928.143(C)(2)(b), the Commission cannot blend provisions from multiple ESPs together.

At the outset, it should be understood that the Joint Applicants are proponents of Ohio's market-based framework that allows customers to either shop for generation services through a competitive retail electric supplier (CRES) or take generation services from the EDU's standard service offer which relies on competitive auctions to set the price of those services. The Joint Applicants therefore recognize the *policy* rationale for why the Commission decided to continue this market-based framework while still allowing DP&L to partially revert to its ESP 1 which pre-dated DP&L's move to market established in ESP 2. Nevertheless, though cognizant of the Commission's desire to avoid disruptions to customers and market participants that could ensue from an abandonment of this market-based framework, the Joint Applicants are concerned that the Order sets a dangerous *legal* precedent that enables EDUs in the future to cherry pick provisions across multiple ESPs that they find most favorable.

Although Joint Applicants do not believe that DP&L can lawfully withdraw its ESP 2 on remand, if the Commission allows such withdrawal, the Commission cannot authorize an EDU to blend provisions across multiple ESPs. R.C. 4928.143(C)(2)(b) provides that if a utility

terminates its ESP application the "[C]ommission 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 increases or decreases in fuel costs * * * ." There is no uncertainty with that provision. By statute, the Commission is limited to authorizing a return to the EDU's most recent ESP together with necessary fuel-cost adjustments. Where a statute is unambiguous, it must be enforced according to its terms.[2] Applying that interpretive principle, the Commission should have concluded that its powers under R.C. 4928.143(C)(2)(b) were limited to authorizing DP&L to implement its ESP 1 after withdrawal, not a blend of its ESP 1 and its ESP 2. By allowing DP&L to return to its ESP 1 while retaining certain aspects of the competitive bidding process which were approved under ESP 2, the Commission plainly exceeded its powers conferred by R.C. 4928.143(C)(2)(b).

The Commission reasons that it is appropriate to allow DP&L to blend its ESP 1 and ESP 2 together because it "will maintain the integrity of the competitive bid process and allow non-shopping customers to continue to benefit from market-based rates."[3] True or not, that *policy* rationale has no support in the statute. By failing to provide a reasoned explanation as to why DP&L should be permitted *by law* to blend its ESP 1 and its ESP 2 together, the Commission has run afoul of R.C. 4903.09. Under 4903.09, the Commission must provide supporting rationale for its decisions, not summary rulings. The Order fails to meet this requirement because in spite of the Commission's *policy* rationale, there is no *legal* rationale grounding its Order in the language of R.C. 4928.143(C)(2)(b).

To remedy its misapplication of the statute, the Commission should reverse its Order and hold that DP&L must continue implementing the terms of its ESP 2 except for the SSR. That

[2] *Sugarcreek Twp. v. Centerville*, 133 Ohio St.3d 467, 2012-Ohio-4649, ¶ 19.

[3] Order at ¶ 21.

outcome will preserve the market-based framework which the Commission sought to uphold through its Order and also avoid any potential for customers to pay unlawful transition revenue or its equivalent.

B. The Commission erred in permitting DP&L to resurrect the Rate Stabilization Charge. The Rate Stabilization Charge is an unlawful transition charge under R.C. 4928.38 and an unlawful POLR charge.

The Commission's resurrection of the once-defunct Rate Stabilization Charge (RSC) should be reversed. Kroger witness Kevin Higgins previously described DP&L's now-invalid SSR as constituting a "de facto extension and expansion" of the RSC.[4] That linkage between the RSC and the SSR establishes that the RSC will function much in the same way as the now-discredited SSR—in other words, the RSC will be used to collect transition revenue or its equivalent in violation of R.C. 4928.38.

That conclusion is reinforced by the language used by DP&L in its tariff sheets to describe the RSC and the SSR. DP&L describes the RSC as a mechanism that "is intended to compensate DP&L for providing stabilized rates for customers."[5] That description bears a striking similarity to the language used by DP&L to describe the unlawful SSR: "The [SSR] is intended to compensate DP&L for providing stabilized service for customers"[6] These analogous descriptions confirm that the RSC will be used to collect costs in the same way as the SSR; namely, to collect unlawful transition revenue or its equivalent.

The Commission should follow the holdings from the Court's two decisions which struck down unlawful stability charges and conclude that the RSC is not permissible because it will

[4] See Direct Testimony of Kevin C. Higgins at 5-6, Case No. 12-426-EL-SSO, et al. (March 1, 2013).

[5] DP&L Filing of Final Tariff Sheets, P.U.C.O. No. 17, Fourth Revised Sheet No. G25, Page 1 of 2 (September 1, 2016).

[6] DP&L Notice of Filing Proposed Tariffs, P.U.C.O. No. 17, Third Revised Sheet No. G29, Page 1 of 1 (August 1, 2016).

enable DP&L to continue to collect unlawful transition revenue or its equivalent. DP&L's market development period ended in 2005.[7] DP&L is required to be fully on its own in the competitive environment.

The Commission reasons that the parties are barred from challenging the resurrection of the RSC due to the doctrines of res judicata and collateral estoppel. That conclusion is in error. The Court has observed that where "there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in a later action."[8] Here, the legal precedent has been radically altered by the Court's recent decisions striking down stability charges for AEP and DP&L. Given this change in circumstances and the presentment of a new issue as outlined by the Court's decisions, the doctrines of res judicata and collateral estoppel do not bar reconsideration of the RSC.

The Commission's attempt to justify the RSC as a legitimate POLR charge is also misplaced. On the one hand, the Commission states that the RSC can be justified as a POLR charge because DP&L maintains a long-term obligation to provide POLR service under R.C. 4928.141.[9] In the same paragraph, however, the Commission acknowledges that auction participants provide POLR services because of their commitment to supply power through the competitive bidding process.[10] The Commission then discounts the POLR service provided by auction participants because there are no further competitive auctions scheduled past May 31,

[7] *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, ¶ 16.

[8] *State ex rel. Westchester Estates, Inc v. Bacon*, 61 Ohio St.2d 42, 45, 529 N.E.2d 1255 (1988)

[9] Order at ¶ 23.

[10] Id.

2017. But that logic is unpersuasive because, by the Commission's own admission, the auction participants are currently providing the POLR function. If DP&L is not currently providing the POLR function, it should not be permitted to collect costs that are intended to compensate it for providing that function.

A final flaw with the Commission's attempt to justify the RSC as a legitimate POLR charge is that DP&L relied on a discredited methodology, the Black-Scholes model, to calculate the costs under the RSC that it allegedly incurred to provide POLR service.[11] The Court has previously determined that the Black-Scholes model is not a reliable method to determine an EDU's POLR costs.[12] Given this precedent, the Commission cannot resurrect the RSC under a POLR theory that is backed by the Black-Scholes model.

[11] DP&L Rebuttal Testimony of Strunk at 4-5, Case No. 05-276-EL-AIR (October 31, 2005) (explaining the Black-Scholes model).

[12] *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 25-26.

III. Conclusion.

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

Respectfully submitted,

/s/ Joel E. Sechler
Joel E. Sechler (0076320)
Danielle G. Walter (0085245)
Carpenter Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
sechler@carpenterlipps.com
Ghiloni@carpenterlipps.com

Counsel for OMA

/s/ Ryan P. O'Rourke
Ryan P. O'Rourke (0082651)
Carpenter, Lipps & Leland LLP
280 N. High Street, Suite 1300
Columbus, Ohio 43215
Telephone: 614.365.4100
Fax: 614.365.9145
o'rourke@carpenterlipps.com

Counsel for Kroger

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.

/s/ Ryan P. O'Rourke
Ryan P. O'Rourke

Judi.sobecki@dplinc.com
Randall.griffin@dplinc.com
cfaruki@ficlaw.com
jsharkey@ficlaw.com
Arthur.meyer@dplinc.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Philip.sineneng@thompsonhine.com
bmcmahon@emh-law.com
Elizabeth.watts@duke-energy.com
Rocco.d'ascenzo@duke-energy.com
ricks@ohanet.org
mwarnock@bricker.com
dborchers@bricker.com
gary.a.jeffries@dom.com
cmooney2@columbus.rr.com
whitt@whitt-sturtevant.com
Campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
vparisi@igsenergy.com
barthroyer@aol.com
trent@theoec.org
Williams.toddm@gmail.com
ejacobs@ablelaw.org
William.wright@ohioattorneygeneral.gov
Thomas.lindgren@ohioattorneygeneral.gov
Thomas.mcnamee@ohioattorneygeneral.gov
Werner.margard@ohioattorneygeneral.gov
mjsettineri@vorys.com
smhoward@vorys.com
david.fein@constellation.com
Cynthia.a.fonner@constellation.com
Tasha.hamilton@constellation.com
Tony_long@ham.honda.com
Stephen.bennett@exeloncorp.com
rbrundrett@ohiomfg.com
dconway@porterwright.com
aemerson@porterwright.com
haydenm@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
aehaedt@jonesday.com
jejadwin@aep.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Alan.starkoff@icemiller.com
Chris.michael@icemiller.com
ssolberg@eimerstahl.com
mjsatterwhite@aep.com
stnourse@aep.com
Bojko@carpenterlipps.com
Sechler@carpenterlipps.com
gpoulos@enernoc.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
henryeckhart@aol.com
wis29@yahoo.com

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