BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Case No. 08-1094-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13.	:	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	:	Case No. 08-1097-EL-UNC

MEMORANDUM IN OPPOSITION OF THE DAYTON POWER AND LIGHT COMPANY TO APPLICATIONS FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO ENERGY GROUP, THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, AND THE KROGER COMPANY

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I. INTRODUCTION

The Commission acted correctly to order DP&L to institute temporary rates until rates to be ordered in DP&L's pending ESP case take effect. The Supreme Court of Ohio described the process that the Commission must follow after a remand from the Court:

> "the statutes [of Title 49] make clear [1] that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; [2] that the schedule remains in effect until replaced by a further order of the commission; [3] that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and [4] that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."

Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 116-17, 346 N.E.2d 778 (1976) (emphasis added). The Court also explained that its "task is not to set rates; it is only to assure that the rates are not unlawful and unreasonable, and that the rate-making process itself is lawfully carried out." Id. at 108.

Consistent with those requirements, and in response to the Supreme Court of Ohio's decision in In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490 (Sup. Ct. Ohio June 20, 2016), the Commission granted The Dayton Power and Light Company's ("DP&L") motion to withdraw its Electric Security Plan ("ESP") application in Case No. 12-426-EL-SSO, et al.,[1] and to implement rates that are consistent with the rates that were in effect before the Commission's September 4, 2013 Opinion and Order in

[1] Aug. 26, 2016 Finding and Order, ¶ 17 (Case No. 12-426-EL-SSO).

that case ("2013 Rates").[2] The 2013 Rates that the Commission approved would be in effect for only a limited time -- DP&L's third ESP case (Case No. 16-395-EL-SSO) is pending before the Commission. The 2013 Rates that the Commission approved will be in effect only until that case is decided.

The Commission correctly held that Ohio Rev. Code § 4928.143(C)(2)(b) establishes that the Commission was required to implement DP&L's 2013 Rates in response to DP&L's withdrawal of its Application in Case No. 12-426-EL-SSO, et al. Various intervenors argue that the Commission should not approve DP&L's request to implement the Rate Stability Charge ("RSC") that was included in DP&L's 2013 Rates. As demonstrated below, the Commission correctly rejected those arguments because (among other reasons) (1) the Commission is required by Ohio Rev. Code §§ 4928.143(C)(2)(b), 4928.141(A) and 4905.32 to implement the 2013 Rates; (2) no party sought rehearing of the Commission's June 24, 2009 Opinion and Order approving the RSC and the doctrine of res judicata bars them from now challenging the 2013 Rates; and (3) the RSC is not unlawful.

In addition, it is important that the Commission recall its factual findings in the 12-426-EL-SSO case that DP&L needed a stability charge so that it could provide stable distribution, transmission and generation service:

> "the Commission believes that [a stability charge] would have the effect of stabilizing or providing certainty regarding retail electric service. We agree with DP&L that if its financial integrity becomes further compromised, it may not be able to provide stable or certain retail electric service . . . . Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the

[2] Aug. 26, 2016 Finding and Order, ¶ 30 (Case No. 08-1094-EL-SSO).

> generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that [a stability charge] will provide stable revenue to DP&L for the purpose of maintaining its financial integrity."

Sept. 4, 2013 Opinion and Order, pp. 21-22) (Case No. 12-426-EL-SSO) (emphasis added). DP&L's need for a stability charge to allow it to provide safe, stable and reliable distribution, transmission and generation service has not changed.

Recent actions by credit rating agencies demonstrate the continuing need for such relief following the Supreme Court's reversal of the Commission's decision in that case. On June 27, 2016, S&P Global Ratings ("S&P") stated that the Supreme Court's decision reversing the Commission's decision in Case No. 12-426-EL-SSO "increases the likelihood of a weaker financial risk profile, reflecting weaker financial measures for DPL and DP&L that could result in a near term ratings downgrade." On August 30, 2016, S&P issued a Research Update that stated that "[t]he rating outlook is negative." In that same Research Update, S&P further stated that "We could lower the ratings on DPL and DP&L over the next nine months if the company experiences adverse regulatory outcomes that weakened its financial ratios, including FFO to debt that is consistently at or below 9%." Similarly, on July 12, 2016, FitchRatings ("Fitch") revised the rating outlook for DP&L and DPL Inc. from stable to negative. Fitch explained that "[t]he resolution of the Negative Outlook will depend upon the amount, sustainability and timeliness of alternative regulatory relief from PUCO, as well as the companies' ability to refinance or repay the 2016 maturities in a timely manner with reasonable terms." The agency "continues to believe that the PUCO will ultimately authorize an alternative rider for DP&L to mitigate the Ohio Supreme Court ruling. However, the path and timing to that end are primary

credit concerns." On August 11, 2016, Moody's Investors Service issued a credit opinion that stated that "We believe that outcome of these different regulatory proceedings will be credit supportive for DP&L and DPL. This view considers PUCO's track record of balanced decisions between the end-users' interests and the utilities group's financial viability. However, the negative outlook captures the uncertainty as to the timing of these decisions and whether the terms of the ESP-III will be also subject to future disputes or judicial challenges."

Thus, the Commission's decision to implement 2013 Rates in this case is not only mandated by law, but also necessary to allow DP&L to maintain its financial integrity so that it can continue to provide safe and reliable service.

II. THE COMMISSION ORDER IMPLEMENTING THE RSC WAS LAWFUL

The Commission granted DP&L's motion to withdraw and terminate its ESP II[3] pursuant to Ohio Rev. Code § 4928.143(C)(2)(a). Aug. 26, 2016 Finding and Order, ¶ 17 (Case No. 12-426-EL-SSO).

In this case, the Commission thus held:

> "Pursuant to R.C. 4928.143(C)(2)(b), if the utility terminates an ESP, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO. We note that we have granted DP&L's motion to withdraw *ESP II*, thereby terminating it. Accordingly, with the termination of *ESP II*, the Commission finds that DP&L shall implement the provisions, terms and conditions of *ESP I*, along with any expected increases or decreases in fuel costs, pursuant to R.C. 4928.143(C)(2)(b), until a subsequent SSO is authorized.
>
> * * *

[3] DP&L will refer to Case No. 08-1094-EL-SSO as "ESP I," Case No. 12-426-EL-SSO as "ESP II," and Case No. 16-395-EL-SSO as "ESP III."

> The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. We note there are no further competitive auctions scheduled to procure energy and capacity for non-shopping customers after May 31, 2017. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of *ESP I.* The Commission stated in its December 19, 2012, Entry in this case, '[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.' *ESP I Case,* Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of *ESP I. ESP I Case*, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of *ESP I*; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

Aug. 26, 2016 Finding and Order, ¶¶ 20, 23 (Case No. 08-1094-EL-SSO) (alteration in original) (emphasis added).

The Commission's decision was correct for the following separate and independent reasons.

A. OHIO REV. CODE § 4928.143(C)(2)(b) ESTABLISHES THAT THE COMMISSION'S ORDER APPROVING THE RSC WAS LAWFUL

Various intervenors argue (IEU, pp. 15-22; OMA/Kroger, pp. 8-10; OCC, pp. 3-6) that the portion of the Commission's order that allowed DP&L to collect the RSC was

unlawful. Those arguments are inconsistent with Ohio Rev. Code § 4928.143(C)(2). Pursuant to that statute:

> "(a) 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.
>
> (b) 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 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."

Ohio Rev. Code § 4928.143(C)(2) (emphasis added).

OEG (p. 5) argues that DP&L cannot withdraw its ESP II application unless ordered to do so by the Commission, and not in response to the Supreme Court of Ohio decision because the Commission did not act "voluntarily." (OEG, p. 5). In making this argument, OEG reads words into the statute that just do not exist. Moreover, DP&L had the unilateral right to withdraw its ESP II application at any time; DP&L filed that application, and has the right to withdraw it.

The terms of Ohio Rev. Code § 4928.143(C)(2)(b) are quite clear -- the Commission must implement "the provisions, terms, and conditions of the utility's most recent standard service offer." There is no dispute that DP&L's ESP I is DP&L's most recent SSO. Nor is there any dispute that the RSC was a term of that SSO. The Commission found (as a factual matter) that its order, in the language of § 4928.143(C)(2)(b) , was "necessary to continue the

provisions, terms, and conditions of the utility's most recent" SSO. Section 4928.143(C)(2)(b) thus establishes that the Commission's order authorizing the RSC is lawful.

B. THE SUPREME COURT REVERSED THE DECISION OF THE COMMISSION IN ITS ENTIRETY, REQUIRING A RETURN TO RATES CONSISTENT WITH DP&L'S 2013 RATES UNTIL NEW RATES ARE SET

The Supreme Court reversed the Commission's order approving DP&L's ESP II in toto: "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 ___." In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016) (emphasis added). The Court could have reversed-in-part or modified the Commission's decision, but did not. Ohio Rev. Code § 4903.13. It also could have identified a portion of the decision that it found "unlawful or unreasonable," but did not. Id. Nor did the Court remand the action back to the Commission for further consideration, further demonstrating the full overturning of ESP II. Instead, the Court simply reversed the Commission's decision in toto.

The assertion by OEG (pp. 3-5) that the only issue before the Court was the legality of the Service Stability Rider ("SSR") is false. On the contrary, several other errors were raised.[4] It would be unreasonable for the Commission to speculate (as OEG does) that the Court reversed the Commission's decision insofar as it authorized the SSR, but otherwise affirmed it

[4] There were assignments of error that were not related to the SSR. For instance, OCC argued that the Commission's September 6, 2013 Entry Nunc Pro Tunc was unlawful, and that the Commission "unreasonably and unlawfully erred in granting DP&L's request for rehearing of the PUCO's March 19, 2014 Second Rehearing Entry." Sept. 22, 2014 Second Notice of Appeal by The Office of the Ohio Consumers' Counsel, p. 4. IEU further argued that DP&L's ESP was not more favorable in the aggregate than a market rate offer. Aug. 29, 2014 Notice of Appeal of Appellant Industrial Energy Users-Ohio, pp. 4-5. Finally, DP&L argued that the Commission erred in accelerating its original deadline for DP&L to divest its generation assets. Sept. 19, 2014 Notice of Cross-Appeal of The Dayton Power and Light Company, p. 3.

while those various issues were pending. The Court could have so specified (e.g., by writing "We reverse as to the SSR and affirm in all other respects") but did not.

The Court never instructed the Commission merely to excise the SSR from DP&L's tariff sheets and certainly did not order rates to be lower. Indeed, doing so would be contrary to the Court's longstanding reluctance to involve itself with such detail in the ratemaking process. City of Dayton v. Pub. Util. Comm., 174 Ohio St. 160, 162, 187 N.E.2d 150 (1962) (per curiam) ("The members of this court are neither accountants nor engineers, and manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult question of the reasonableness of the order than is the commission."), modified on rehearing on other grounds, 174 Ohio St. 604, 190 N.E.2d 913 (1963). Accord: Cleveland Elec. Illum. Co. v. Pub. Util. Comm., 46 Ohio St.2d 105, 108, 346 N.E.2d 778 (1976) (holding that the Court's "task is not to set rates; it is only to assure that the rates are not unlawful and unreasonable, and that the rate-making process itself is lawfully carried out").

Instead, the Court ruled that – in light of In re Application of Columbus S. Power Co. – the Commission's decision in ESP II modifying and approving DP&L's ESP was reversed. In re Application of Dayton Power and Light Co., at ¶ 1. The Commission now must issue an "appropriate order" that "replaces the reversed order." Cleveland Elec., at 117. This result, which leaves to the Commission the specifics of executing the mandate, is consistent with Court's jurisdiction, which is limited by law to reviewing "final orders" of the Commission. Ohio Constitution Article IV, Section 2(d) (granting the Court "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law"); Ohio Rev. Code § 4903.13 ("A final order made by the public utilities commission shall be reversed, vacated, or

modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."). Accord: Chevron U.S.A. Inc. v. NRDC, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("since this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment").

Pursuant to Ohio Rev. Code § 4928.141(A): "Only a standard service offer authorized in accordance with § 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section." Similarly, Section 4905.32 states: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." As the Supreme Court of Ohio reversed in toto the Commission's September 4, 2013 Opinion and Order, those sections establish that the Commission must implement the immediately-prior standard service offer that the Commission authorized for DP&L, which was from ESP I. The Commission's order authorizing the RSC is thus lawful.

C. NO PARTY SOUGHT REHEARING OF THE COMMISSION'S ORDER IN CASE NO. 08-1094-EL-SSO

The Commission's conclusion (¶ 23) that intervenors are barred by the doctrine of res judicata and collateral estoppel from challenging the RSC is correct. Specifically, on February 24, 2009, DP&L filed a Stipulation and Recommendation with the Commission in Case No. 08-1094-EL-SSO. That Stipulation was signed by five of the parties that seek rehearing here

-- namely, OCC, IEU, OMA, Kroger, and OPAE.[5] The Commission approved that Stipulation. June 24, 2009 Opinion and Order, p. 13 (Case No. 08-1094-EL-SSO). The arguments by the intervenors -- OMA/Kroger, p. 9; OCC, pp. 7-10 -- that those doctrines do not apply are incorrect.

Specifically, no party to the 08-1094-EL-SSO case sought rehearing of the Commission decision approving that Stipulation, and no party appealed that decision. It is well settled in Ohio that a party cannot challenge a decision if it did not seek rehearing of that decision. Ohio Rev. Code § 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing."). While several parties contest the application of res judicata or collateral estoppel, no party disputes that Ohio Rev. Code § 4903.10(B) bars their arguments challenging the RSC.

The intervenors are also barred from challenging the lawfulness of 2013 Rates by the doctrine of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id.

[5] Feb. 24, 2009 Stipulation and Recommendation, pp. 21-22 (Case No. 08-1094-EL-SSO).

(emphasis added) (internal citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (internal citation omitted). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (internal quotation marks and citation omitted). Accord: Natl. Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.") (internal quotation marks, citation and emphasis omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982).

The Commission has held that the principles of res judicata and collateral estoppel apply in Commission proceedings. Aug. 24, 2005 Entry, pp. 3-4 (Case No. 05-886-EL-CSS) ("The Ohio Supreme Court has confirmed that 'where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.'") (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus); Feb. 13, 2014 Opinion and Order, p. 36 (Case No. 12-2400-EL-UNC) ("There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral

estoppel applies to administrative proceedings before the Commission."); Dec. 2, 2015 Entry, p. 3 (Case No. 15-796-TR-CVF) ("The Commission finds that Quality Carriers is precluded from raising the same issues in this proceeding that were previously decided in Quality Carriers 1 under the doctrines of res judicata and collateral estoppel.").

OCC (pp. 7-8) argues that this issue was not previously litigated in the ESP I case and that it should not be collaterally estopped from raising the "transition charge" argument. However, collateral estoppel also applies to arguments that could have been brought in an earlier action. Section 4928.39 was in effect at the time DP&L's ESP I was filed and litigated and OCC could have raised the argument at that time but chose not to do so. Since no party challenged the Commission's decision in ESP I, the Commission correctly held that intervenors are barred by res judicata and collateral estoppel from challenging the lawfulness of the RSC.

Although there is an exception to collateral estoppel for a change in factual circumstances as argued by OMA, Kroger, and OCC (see, OMA/Kroger, p. 9; OCC, p. 9), the intervenors do not point to any change in facts about the RSC or how it would operate; instead they cite to the Supreme Court decision. That decision is not a change in facts; in fact, it is not even a change in law because, as previously mentioned, Section 4928.39 existed at the time of ESP I and the transition cost issue could have been raised in DP&L's ESP I case.

For these reasons, the Commission should deny the Applications for Rehearing because the claims are barred by collateral estoppel and res judicata.

D. THE RSC IS NOT A TRANSITION CHARGE

Several intervenors (OMA/Kroger, pp. 8-9; OCC, p. 6) argue that the RSC is a transition charge. The Commission found that the RSC was not a transition charge. Dec. 19,

2012 Entry, p. 4 (Case No. 12-426-EL-SSO). Moreover, in the AEP case, the Supreme Court of Ohio held that AEP-Ohio's RSR was a lawful stability charge under Ohio Rev. Code § 4928.143(B)(2)(d). In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 43-59 (Sup. Ct. Ohio Apr. 21, 2016). However, the Court ruled that a portion of AEP's RSR was a transition charge and was barred by Ohio Rev. Code § 4928.38. Id. at ¶ 14-40.

As shown below, AEP did not raise, and a majority of the Court did not consider, whether (1) the "[n]otwithstanding" clause of § 4928.143(B) negates the applicability of § 4928.38, and (2) as the later-enacted statute, § 4928.143(B)(2)(d) cannot be not limited by § 4928.38. Those points establish that a stability charge under Ohio Rev. Code § 4928.143(B)(2)(d) is not an unlawful transition charge.

1. A Stability Charge Is Lawful "Notwithstanding Any Other Provision of Title [49]"

Section 4928.143(B)(2)(d) states:

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> * * *
>
> (2) The plan may provide for or include, without limitation, any of the following:
>
> * * *
>
> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such

> deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

(Emphasis added.)

The "[n]otwithstanding" clause of Ohio Rev. Code § 4928.143(B) establishes that a stability charge like the RSC is lawful even if it were a transition charge. Specifically, the sections that bar the recovery of transition costs are §§ 4928.141(A) and 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause. DP&L's RSC would thus be lawful even if it was a transition charge.

The Supreme Court interprets "notwithstanding" clauses broadly, holding that they "indicate[] the General Assembly's intention" that a given provision "take[s] precedence over any contrary statute purporting to limit" that provision. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35 (emphasis added). Accord: Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) ("a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.") (emphasis added).

In the AEP case, the majority of the Supreme Court declined to consider whether the "[n]otwithstanding" clause saved AEP-Ohio's stability charge because "no party appears to have raised the issue." In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 38 n.3. Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the Commission to interpret the "notwithstanding" clause. Id. at ¶ 71-79. The Commission may thus consider the "notwithstanding" clause issue in this proceeding, and should

conclude that the clause establishes that a stability charge authorized by Ohio Rev. Code § 4928.143(B)(2)(d) is not barred by the transition cost sections.

2. Section 4928.143(B)(2)(D) Is the Later-Enacted Statute

There is a separate and independent reason that the RSC does not violate the prohibition (passed in 1999) in Ohio Rev. Code § 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the RSC is lawful under § 4928.143(B)(2)(d). That section was included in Am.Sub.S.B. 221, which was passed in 2008, years after the transition costs statute was enacted.

Section 4928.143(B)(2)(d) was enacted after § 4928.38; therefore, a stability charge approved under § 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge under § 4928.38. Ohio Rev. Code § 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.").

In its Opinion in the AEP case, the Supreme Court of Ohio noted that § 4928.141(A), which was also included in Am.Sub.S.B. 221 (i.e., at the same time as § 4928.143(B)(2)(d)), includes a prohibition against the recovery of "'previously authorized allowances for transition costs.'" In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 17 (quoting § 4928.141(A)). That section does not change the analysis in the first two paragraphs of this section because the term "transition cost" is defined by statute, and the RSC does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as historic costs that a utility incurred in the past (generally, costs of constructing generation plants). Ohio Rev. Code § 4928.39(A) ("The costs were prudently incurred.") (emphasis added); Ohio Rev. Code

§ 4928.39(B) ("The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 22.

In contrast, the RSC was set at an amount to allow DP&L to provide stable retail electric service in the future. June 24, 2009 Opinion and Order, pp. 8-9 (Case No. 08-1094-EL-SSO) (rejecting challenge to RSC and stating that the Stipulation promotes "rate certainty"). Therefore, the RSC does not recover "transition costs," as defined by statute, since the RSC is forward-looking.

In its decision in the AEP Case, the Supreme Court held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by § 4928.38. In re Application of Columbus S. Power Co., at ¶ 25. As demonstrated in the first two paragraphs of this section, the statutory bar against recovering the "equivalent" of transition costs in § 4928.38 does not bar DP&L's recovery of the RSC, because § 4928.143(B)(2)(d) is the later-enacted statute.

Section 4928.141(A) does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, § 4928.141(A) bars the recovery only of "transition costs." Since the RSC is designed to allow DP&L to provide rate certainty in the future, it does not satisfy the statutory definition of transition costs, and it is not barred by § 4928.141(A).

That conclusion – that the equivalent of transition costs can be recovered through § 4928.143(B)(2)(d), and the recovery is not barred by § 4928.141(A) – is consistent with the structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide

stable "retail electric service" (a term defined to include generation service) through § 4928.143(B)(2)(d). Such a charge is necessarily forward-looking. The General Assembly continued the prohibition against the recovery of transition costs (i.e., historic costs of constructing generation plants) in § 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in § 4928.143(B)(2)(d).

In short, the RSC is recoverable under § 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in § 4928.38 is inapplicable because § 4928.143(B)(2)(d) is the later-enacted statute. Further, the RSC is forward-looking and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in § 4928.141(A) is thus inapplicable.

E. THE COMMISSION'S DECISION TO ELIMINATE THE EIR DOES NOT SHOW THAT THE RSC WAS UNLAWFUL

The Commission held that DP&L could not continue to collect the EIR. Aug. 26, 2016 Finding and Order, ¶ 22. IEU (pp. 15-17) argues that the Commission's decision on the EIR somehow establishes that the RSC is unlawful. Not so. Specifically, as demonstrated above, the Commission was required to implement DP&L's ESP I rates for multiple independent reasons, including that § 4928.143(C)(2)(b) required the Commission to do so. The fact that the Commission decided not to continue all of the ESP I rates and rejected the EIR does not establish that the Commission erred by continuing other rates from ESP I. Indeed, at best, IEU's argument shows that the Commission should have ordered that both the RSC and the EIR be implemented.

F. THE COMMISSION SHOULD REJECT THE INTERVENORS' POLR ARGUMENTS

Several intervenors -- OMA/Kroger, pp. 9-10; OCC, pp. 10-12; IEU, pp. 16-19 -- argue that the RSC is a POLR charge, and that DP&L is no longer subject to provider of last resort ("POLR") risk. However, the Commission has already correctly held (¶ 23) that "DP&L maintains a long-term obligation to serve as a provider of last resort." Aug. 26, 2016 Finding and Order, ¶ 23. The Commission's holding on that issue was plainly correct. Ohio Rev. Code § 4928.141.

In addition, a risk remains that a winning auction bidder could default. In that event, the Bidding Rules for The Dayton Power and Light Company's Competitive Bidding Plan auctions state:

> "11.2 If a Winning Bidder Defaults Prior to or During the SSO Delivery Period
>
> In the event a winning bidder defaults prior to or during the delivery of SSO load requirements, The Dayton Power and Light Company will implement a Contingency Plan for the open tranches. The open tranches will be made available in the next auction if that auction occurs before the delivery period of the open tranches. If the next auction does not occur before the delivery period, then the open tranches will be offered to other current SSO Suppliers using the same procedure as used for unfilled tranches at the auction as described above.
>
> If tranches still remain open after the procedures above are applied the necessary SSO supply requirements will be met through PJM-administered markets at prevailing Day-ahead zonal spot prices, and, unless instructed otherwise by the PUCO, The Dayton Power and Light Company will not enter into hedging transactions to attempt to mitigate the associated price or volume risks to serve these tranches. Additional costs incurred by The Dayton Power and Light Company in implementing the Contingency Plan will be assessed first against the defaulting supplier's credit security, to the extent available." (Emphasis added.)

DP&L thus continues to bear a POLR risk, and the arguments by OMA/Kroger, OCC and IEU that DP&L no longer bears such a risk are incorrect.

III. THE COMMISSION'S DECISION TO MAINTAIN ASPECTS OF ITS ESP II CASE MINIMIZES CUSTOMER AND MARKET IMPACTS

The Commission ordered DP&L to maintain the competitive bidding process estimate in ESP II:

> "As a preliminary matter, the Commission grants DP&L's proposals to recover the costs of energy and capacity obtained through the competitive bid process to serve non-shopping customers through base generation rates (the 'standard offer' tariff sheet) and to set the fuel rider to zero, excluding amounts being reconciled from prior periods. R.C. 4928.143(C)(2)(b) requires the Commission to adjust for any expected increases or decreases in fuel costs from those contained in the previous SSO. We find that R.C. 4928.143(C)(2)(b) allows adjustment for purchased power as well as fuel. In this case, all of DP&L's non-shopping customers are being served by energy and capacity purchased from the wholesale markets through the competitive bidding process. It is long standing regulatory practice for 'fuel' and 'purchased power' to be used interchangeably. For example, DP&L's existing fuel rider specifically includes both fuel and purchased power costs. Therefore, the Commission finds that DP&L's proposed tariffs should be approved as it relates to honoring existing contracts with winning competitive bid suppliers and maintaining current PJM obligations for all suppliers. This will maintain the integrity of the competitive bid process and allow non-shopping customers to continue to benefit from market-based rates." Aug. 26, 2016 Finding and Order, ¶ 21.

Several intervenors -- OMA/Kroger (pp. 6-8) and OEG (pp. 7-8) -- argue that the Commission erred by implementing portions of the Commission's order from ESP I and other portions of the Commission's order from ESP II. As demonstrated below, those arguments ignore several key points: (1) competitive bidding has occurred in DP&L's service territory, and parties have entered into contracts in reliance upon that process; (2) several riders are not impacted by the orders from ESP II (e.g., Universal Service, Energy Efficiency Rider,

Alternative Energy Rider); and (3) DP&L's rates would actually be significantly higher if new rates were implemented exactly how they existed in 2013.

Specifically, there was no competitive bidding in place in 2013. In 2013, DP&L's Standard Service Offer was provided by DP&L and the rates were set equal to DP&L's then-existing generation rates, with certain modifications for fuel costs. Feb. 24, 2009 Stipulation and Recommendation, ¶¶ 1-2 (Case No. 08-1094-EL-SSO).

In its Order approving DP&L's ESP application in Case No. 12-426-EL-SSO, the Commission required that DP&L's SSO rates be set through a competitive bidding process. Sept. 4, 2013 Opinion and Order, pp. 15-17 (Case No. 12-426-EL-SSO). As the Commission knows, various rounds of competitive bidding have occurred, all of which are set to expire in May 2017.

In its Notice of Filing Proposed Tariffs, DP&L stated that it "will honor existing contracts with winning competitive bid suppliers through the end of their term (May 2017) and maintain current PJM obligations for all suppliers" and that its proposed tariffs "will reflect the Competitive Bid rate in order to minimize rate impacts to customers." Aug. 1, 2016 The Dayton Power and Light Company's Notice of Filing Proposed Tariffs, p. 2 (Case No. 08-1094-EL-SSO, et al.). DP&L's Tariffs for Standard Offer Generation, G10-G18, thus reflect the results of the most recent competitive bidding process. Id.

In their oppositions to DP&L's motion to implement 2013 rates, various intervenors agree that the results of the competitive bidding process should be honored. For example, OCC (pp. 6-7) asserted that "DP&L has procured power for standard service through May 31, 2017 by way of auctions held much earlier. Those auctions cannot be undone."

Similarly, RESA (p. 11) asserted that implementation of new rates should not "negatively interfere with existing customer contracts, existing prices and customer relationships." By maintaining the results of the competitive bidding in Case No. 12-426-EL-SSO, as well as the same PJM line item responsibilities for all suppliers, the Commission has taken steps to maintain the integrity of the market.

OMA/Kroger and OEG argue that rates should be put in place exactly as they were in 2013. Contrary to their own economic interests, they ignore the point that those rates were significantly higher than those in in effect today and those approved by the Commission. The combination of riders that made up the SSO generation rates from the 08-1094-EL-SSO case were significantly higher than the competitive bidding rates from the 12-426-EL-SSO case. In addition, several other riders (i.e., Universal Service, Energy Efficiency Rider, Alternative Energy Rider) that are not affected by the order in ESP II were also much higher in 2013 than today. Those riders also have regularly scheduled true-ups, so it would be illogical to revert to higher 2013 rates. Additionally, the Commission's decision that DP&L could not implement the EIR further lowered consumer rates below the rate for ESP I. The Commission should thus reject the intervenors' arguments that the Commission should have implemented 2013 Rates exactly as they existed in 2013 before the Commission's Order granting DP&L's application in Case No. 12-426-EL-SSO, because doing so would have disrupted the competitive market and related contracts, and actually resulted in rates that are significantly higher than those proposed by DP&L.

OMA/Kroger (pp. 7-8) argue that to "remedy its misapplication of the statute," the Commission should implement ESP II, except for the SSR. That argument is directly inconsistent with § 4928.143(C)(2)(b), which as demonstrated above, requires that DP&L's

ESP I be implemented. OMA/Kroger's argument that the statute should be interpreted to require ESP I to be implemented exactly as it existed in 2013 would lead to higher rates, and should be rejected.

Similarly, IEU (pp. 7-14) asserts that DP&L's nonbypassable transmission charge that was authorized in the 12-426-EL-SSO case should be rejected. The Commission (¶ 24) rejected that argument:

> "Further, the Commission finds the elimination of the transmission cost recovery riders, TCRR-B and TCRR-N, would unduly disrupt both the competitive bidding process supplying the SSO and individual customer contracts with suppliers of competitive retail electric service (CRES Providers). The wholesale suppliers for SSO customers rely upon DP&L to acquire certain transmission services under the TCRR-N and may not have included the costs of these transmission services in their bids to serve SSO customers. Thus, elimination of the TCRR-N may severely disrupt existing contracts for wholesale suppliers and discourage future participation in the competitive bidding process. Preservation of the integrity of the competitive bidding process is of the highest priority for the Commission. Likewise, CRES Providers also rely upon DP&L to procure certain transmission services under the TCRR-N and could be forced to terminate or renegotiate their contracts with their customers if the TCRR-N were eliminated. Further, if a mechanism like the TCRR-N is eliminated in this case and then restored in DP&L's next SSO, contracts between CRES Providers and individual customers could be further disrupted by the subsequent regulatory change. Accordingly, we will not accept lEU Ohio's recommendation to eliminate the TCRR-N and TCRR-B at this time." Aug. 26, 2016 Finding and Order, ¶ 24.

IEU's argument ignores the fact that existing CRES contracts, existing SSO auction-winning bids and related Master SSO Supply Agreements are all premised upon the TCRR-N/TCRR-B structure that was put in place in ESP II and continues to exist today. Those contracts and winning bids assume that transmission costs would be incurred by DP&L and recovered by DP&L through the TCRR-N. The Commission's order thus maintains that structure

to maintain stability in the market. Indeed, in August 12, 2016 comments filed in response to DP&L's proposed tariffs, IGS stated: "Authorization of a bypassable transmission rider for any period of time would reek [sic] havoc on the retail electric service market and have the potential to open the floodgates to collateral litigation." Aug. 12, 2016 Comments of Interstate Gas Supply, Inc., p. 5 (Case No. 08-1094-EL-SSO). A substantial change to the TCRR-N structure would require ample lead time in order for competitive suppliers in DP&L's territory to be able to make the required adjustments to existing and new contracts. Further, IEU's request regarding bypassable transmission is already pending in DP&L's ESP III case, and given the temporary nature of implementing 2013 rates, is more appropriately addressed there.

IV. REQUIRING DP&L TO REFUND THE SSR WOULD BE CONTRARY TO OHIO LAW

IEU's (pp. 22-46) and OEG's (pp. 8-9) request for an order requiring DP&L to refund amounts collected under the SSR would be contrary to longstanding Ohio law and Commission precedent. Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus ("Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."). Accord: id. at 257 ("Under [§ 4905.32] a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.") (emphasis added).

Moreover, refunds violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." Lucas Cty. Commrs. v. Pub. Util. Comm., 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). Since the Commission already has issued an order providing for the SSR, the requested "refund" is forbidden by § 4905.32 ("No public utility shall refund . . . .").

The Supreme Court of Ohio rejected a similar argument when reviewing AEP-Ohio's 2008 ESP case. In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In that case, OCC argued that the Commission should have made AEP-Ohio's ESP rates subject to refund. Id. at ¶ 16. The Court rejected that argument, explaining that "under Keco, we have consistently held that the law does not allow refunds in appeals from commission orders." Id. Accord: Ohio Consumers' Counsel v. Pub. Util. Comm., 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21 ("any refund order would be contrary to our precedent declining to engage in retroactive ratemaking"); Green Cove Resort I Owners' Assn. v. Pub. Util. Comm., 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in Keco . . . . "); In the Matter of the Application of The Dayton Power and Light Company for Approval of Tariff Changes Associated with the Request to Implement a Billing Cost Recovery Rider, Case No. 05-792-EL-ATA (Mar. 1, 2006 Opinion and Order), p. 14 (rejecting motion to collect rider subject to refund as contrary to Commission precedent).

IEU's argument (pp. 29-39) that the Commission should override the decision of the Supreme Court is meritless. As the Commission knows, it is required to follow the precedent from the Court that refunds are not lawful.

IEU (p. 25) and OEG (pp. 8-9) assert that the Supreme Court of Ohio's ruling in In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip. Op. 2016-Ohio-1608, ¶ 40 (Sup. Ct. Ohio Apr. 21, 2016) ordered a refund to customers. The Commission should reject that argument for two separate and independent reasons.

First, the principle that collected rates are not subject to refund is often cited and has been the law in Ohio since at least 1957. Keco, 166 Ohio St. 254. The Court did not overrule that precedent in its AEP decision -- indeed, if it intended to do so, it would have done so expressly.

Second, IEU's and OEG's characterization of what happened in that case is not accurate. Specifically, the Court concluded that AEP was collecting two types of capacity costs through its RSR:

1. Deferral: The Court explained that AEP's Commission-approved costs of providing capacity were $188.88 per megawatt day. In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 28. The Commission authorized AEP to charge CRES providers the PJM auction prices for capacity, and to defer and recover from customers the difference between the two rates through the RSR. Id. at ¶ 29.

2. Nondeferral: The Court also concluded that AEP was recovering an additional $508 million under the RSR that included capacity costs: "Yet despite the fact that the commission authorized AEP to recover its actual capacity costs, the commission also allowed AEP to recover $508 million in additional revenue through the RSR during the ESP period, the amount

of which appears to be tied in large part to AEP's recovery of CRES capacity charges." Id. at ¶ 34.

The Court thus concluded that AEP was recovering the same capacity costs twice -- once though the deferral portion of the RSR and once through the nondeferral portion. Id. ("Thus, the commission awarded AEP additional capacity revenues through the nondeferral portion of the RSR, even though it had found that AEP would fully recover its incurred CRES capacity costs at a rate of $188.88 per megawatt-day. Accordingly, we find that the company is being overcompensated for providing capacity service through the nondeferral part of the RSR.") Id. To eliminate the double recovery of capacity costs, the Court ordered AEP to eliminate from the deferral of capacity costs any capacity costs that were already recovered through the nondeferral portion of the RSR. Id. at ¶ 40 ("Because AEP is entitled to recover only its actual capacity costs, we order the commission to adjust the balance of its deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP.").

Thus, contrary to IEU's and OEG's claims, the Court did not order AEP to refund any amounts that it had already collected. Instead, consistent with past precedent disallowing double recovery of costs,[6] the Court concluded that AEP had already collected a portion of its

[6] In the Matter of the Complaint of Dominion Retail, Inc., et al., Case No. 03-2405-EL-CSS (Feb. 2, 2005 Opinion and Order), p. 14 (stating that the Commission would "closely analyze the nature of the costs sought to be recovered," and to the extent those costs were recovered in a separate rider, double "recovery will be denied"); In the Matter of the Application of Columbus S. Power Co. to Adjust Its Power Acquisition Rider Pursuant to Its Post-Market Development Period Rate Stabilization Plan, Case No. 07-333-El-UNC (June 27, 2007 Finding and Order), p. 10 n.2 (stating that a utility "should work with the Commission staff to identify and eliminate any double recovery"); In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Cleveland Elec. Illum. Co. and Related Matters, et al., Case Nos. 93-08-EL-EFC and 93-07-EL-EFC, 1994 Ohio PUC LEXIS 912, at *39 (Aug. 10, 1994 Supplemental Opinion and Order) (detailing measure to prevent "double recovery" of expenses).

capacity costs from the nondeferral portion of the RSR, and that AEP was not entitled to recover those same costs a second time. Id.

Further, IEU's argument (pp. 35-39) that the "no refund" rule is "unworkable" ignores the remedy provided by the General Assembly. Specifically, Ohio Rev. Code § 4903.16 allows parties to seek a stay of execution of a Commission order by posting a bond. The General Assembly has thus already provided a remedy to address IEU's concerns that amounts may be collected pursuant to a Commission order that is later held to be unlawful. The Commission is without authority to create new or additional remedies. IEU's argument must be addressed to the General Assembly.

Finally, IEU's argument (pp. 42-43) that no party would be harmed if the Commission ordered DP&L to refund amounts that it has collected is incorrect. As the Commission knows, DP&L's financial integrity is already in jeopardy, and DP&L's ESP III case is intended to address that issue. If DP&L cannot maintain its financial integrity, then it will not be able to provide safe and reliable distribution, transmission and generation service. DP&L and its customers would thus suffer significant harm if DP&L were ordered to make a refund.

V. CONCLUSION

The Commission's order implementing 2013 Rates -- including the RSC -- was lawful pursuant to Ohio Rev. Code §§ 4928.143(C)(2), 4928.141(A) and 4905.32. The Commission should reject the intervenors' argument that the RSC is unlawful, not only because the Commission must implement 2013 Rates pursuant to those sections, but also because (1) the 2013 Rates were implemented by a Stipulation that many of the intervenors signed, and for

which no party sought rehearing; and (2) the RSC is not an unlawful transition charge in any event pursuant to the "notwithstanding" clause in § 4928.143(B)(2).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition of The Dayton Power and Light Company to Applications for Rehearing of Industrial Energy Users-Ohio, The Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Manufacturers' Association Energy Group, and the Kroger Company, has been served via electronic mail upon the following counsel of record, this 6th day of October, 2016:

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Summary: Memorandum Memorandum in Opposition of The Dayton Power and Light Company to Applications for Rehearing of Industrial Energy Users-Ohio, The Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Manufacturers' Association Energy Group, and the Kroger Company electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company