

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 :

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**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 MANUFACTURERS' ASSOCIATION ENERGY GROUP,  
THE KROGER COMPANY, AND THE OHIO ENERGY GROUP**

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## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
I. INTRODUCTION .....	1
II. OHIO REV. CODE § 4928.143(C)(2) IMPOSES NO LIMIT ON DP&L'S RIGHT TO WITHDRAW ITS ESP APPLICATION .....	4
III. INCORPORATION BY REFERENCE .....	7
IV. CONCLUSION.....	7

## 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.,<sup>1</sup> 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

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<sup>1</sup> Aug. 26, 2016 Finding and Order, ¶ 17 (Case No. 12-426-EL-SSO).

that case ("2013 Rates").<sup>2</sup> The 2013 Rates that the Commission approved will 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)(a) establishes that DP&L had the right to withdraw its Application in Case No. 12-426-EL-SSO, et al.

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 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.

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<sup>2</sup> Aug. 26, 2016 Finding and Order, ¶ 30 (Case No. 08-1094-EL-SSO).

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 allow DP&L to withdraw its ESP II application 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. OHIO REV. CODE § 4928.143(C)(2) IMPOSES NO LIMIT ON DP&L'S RIGHT TO WITHDRAW ITS ESP APPLICATION**

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The Commission held that:

"The Commission finds that, pursuant to R.C. 4928.143(C)(2)(a), we have no choice but to grant DP&L's motion and accept the withdrawal of *ESP II*. The Supreme Court of Ohio has held 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 application.' In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶24-30. DP&L filed its motion to withdraw *ESP II* after the Court issued its opinion in apparent anticipation that the Commission would modify its order or issue a new order. As noted above, the Court has held that '[p]ublic utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that the schedule remains in effect until replaced by a further order of the commission; 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 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. Illuminating Co., 46 Ohio St.2d at 116-117."

Aug. 26, 2016 Finding and Order, ¶ 14 (Case No. 12-426-EL-SSO) (alterations in original).

Several intervenors -- IEU, pp. 8-11, OCC, pp. 3-4, OEG, pp. 5-7, OMA/Kroger, pp. 8-10 -- argue that the Commission erred when it allowed DP&L to withdraw and terminate its ESP II application. However, DP&L had the right to do so pursuant to Ohio Rev. Code § 4928.143(C)(2), which states:

"(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).

Thus, "[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 application." In re Application of Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 26. The Supreme Court interprets this statute broadly to achieve that purpose. Id. at ¶ 29-30 (holding that the Commission had "nullifie[d] the clear purpose of R.C. 4928.143(C)(2)(a)" by modifying Ohio Power Company's ESP application after the ESP had expired, thus preventing the utility from withdrawing its ESP).

Section 4928.143(C)(2)(a) permits a utility to withdraw and terminate an ESP application if the Commission modified the ESP application, which already has occurred. Sept. 4, 2013 Opinion and Order, pp. 48-49 ("The Commission made numerous modifications to the proposed ESP, including denying the ST, adjusting the term of the ESP to 36 months, adjusting the proposed blending percentages, adjusting the SSR to \$110 million per year effective January 1, 2014, and denying the proposed rider AER-N.") (Case No. 12-426-EL-SSO). Although DP&L sought to withdraw its application after the Supreme Court's ruling that reversed the Commission's decision, there is no material difference whether the Commission modifies an ESP

in the first instance, or after rehearing, or following reversal by the Supreme Court. In each instance, a utility may withdraw the ESP. In re Application of Ohio Power Co. at ¶ 30 ("As read by the commission, R.C. § 4928.143(C)(2)(a) applies only when the commission is deciding the fate of the ESP application. . . . This would hardly be a 'just and reasonable result.'") (quoting Ohio Rev. Code § 1.47(C)). In fact, the plain meaning of the statute is that a material change to those rates (either by the Commission or the Supreme Court of Ohio) permits the utility to withdraw the application.

Further, in its Finding and Order in Case No. 12-426-EL-SSO, the Commission expressly modified its order approving DP&L's ESP by eliminating the SSR. Aug. 26, 2016 Finding and Order, ¶ 12 (Case No. 12-426-EL-SSO). That modification also established that DP&L had the right to withdraw and terminate its application pursuant to Ohio Rev. Code § 4928.143(C)(2)(a).

In addition, in any event, 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.

OMA/Kroger (pp. 9-10) and OEG (pp. 5-7) argue that Ohio Rev. Code § 4928.143(C)(2)(a) does not allow a party to withdraw an ESP after that ESP has been implemented. However, there is nothing in that section that imposes such a limitation. The statute could have been written to include such a limitation, but was not. That section permits a utility to withdraw and terminate its ESP after an order modifying that ESP is issued, and there is no limit on the utility's right to do so.



DP&L thus has the right to withdraw its ESP application in Case No. 12-426-EL-SSO pursuant to Ohio Rev. Code § 4928.143(C)(2)(a), and the Commission's Finding and Order authorizing DP&L to do so was lawful.

### **III. INCORPORATION BY REFERENCE**

IEU (pp. 11-36) argues that the Commission should have ordered DP&L to refund amounts that it collected through the SSR. DP&L addresses that argument in section IV of its opposition filed in Case No. 08-1094-EL-SSO, et al, which was filed contemporaneously with this opposition, and which DP&L incorporates by reference.

OCC argues (pp. 4-5) that Ohio Rev. Code § 4928.143(C)(2)(b) does not require the Commission to implement DP&L's 2013 Rates. OCC also argues (p. 6) that the RSC is a transition charge. DP&L addresses those arguments in section II of its opposition in Case No. 08-1094-EL-SSO, et al., which DP&L incorporates by reference.

### **IV. CONCLUSION**

The Commission's order authorizing DP&L to withdraw and terminate its ESP II application was consistent with and required by Ohio Rev. Code § 4928.143(C)(2)(b).

Respectfully submitted,

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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 Manufacturers' Association Energy Group, the Kroger Company, and the Ohio Energy Group 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 Manufacturers' Association Energy Group, the Kroger Company, and the Ohio Energy Group electronically filed by Mr. Charles J. Faruki on behalf of The Dayton Power and Light Company