

## **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**

### **THIRD ENTRY ON REHEARING**

Entered in the Journal on December 14, 2016

#### **I. SUMMARY**

{¶ 1} The Commission finds that the assignments of error raised in the applications for rehearing lack merit. Accordingly, the Commission denies the applications for rehearing.

#### **II. PROCEDURAL HISTORY**

{¶ 2} The Dayton Power and Light Company (DP&L) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in

accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} By Opinion and Order (Order) issued on June 24, 2009, in this case, the Commission adopted the stipulation and recommendation of the parties (Stipulation) to establish DP&L's first ESP (*ESP I*). Included as terms, conditions, or charges in *ESP I* we are a rate stabilization charge (RSC), an environmental investment rider (EIR), and a fuel and purchased power rider. Thereafter, by Entry issued on December 19, 2012, the Commission continued *ESP I*, including the RSC, until a subsequent SSO could be authorized.

{¶ 5} By Order issued on September 4, 2013, the Commission modified and approved DP&L's application for a second ESP (*ESP II*). Included in *ESP II* was a service stability rider (SSR) for DP&L's financial integrity. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving *ESP II* and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, \_\_\_ Ohio St.3d \_\_\_, 2016-Ohio-3490, \_\_\_ N.E.3d \_\_\_. Subsequently, on July 16, 2016, a mandate from the Supreme Court of Ohio was filed in the *ESP II Case* requiring the Commission to modify its order or issue a new order. Therefore, on August 26, 2016, in the *ESP II Case*, the Commission modified *ESP II* pursuant to the Court's directive and then granted DP&L's application to withdraw *ESP II*, thereby terminating it.

{¶ 6} R.C. 4928.143(C)(2)(b) provides that if the utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized. By Order issued on August 26, 2016, in this case, the Commission granted DP&L's application to implement its most recent SSO, which is *ESP I*, pursuant to R.C. 4928.143(C)(2)(b). Additionally, the Commission directed DP&L to file tariffs to implement *ESP I*.

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On September 23 and 26, 2016, applications for rehearing were filed by Ohio Partners for Affordable Energy, Edgemont Neighborhood Coalition (OPAE Edgemont), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Energy Group (OEG), the Ohio Manufacturers' Association (OMA), the Kroger Company (Kroger), and the Ohio Consumers' Counsel (OCC) regarding the Commission's August 26, 2016, Order granting DP&L's application to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b). Thereafter, on October 3 and 6, 2016, DP&L filed memoranda contra to the applications for rehearing.

{¶ 9} By Entry issued on October 12, 2016, the Commission granted rehearing for the limited purpose of further consideration of the matters raised in the applications for rehearing. We found that sufficient reason was set forth by the parties to warrant further consideration of the matters raised in the applications for rehearing.

{¶ 10} Thereafter, on November 14, 2016, OCC filed an application for rehearing regarding the Commission's granting of rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing. On November 25, 2016, DP&L filed its memorandum contra to OCC's application for rehearing.

### III. DISCUSSION

{¶ 11} Initially, the Commission notes that many of the assignments of error raised by the parties are not relevant to this case. Pursuant to R.C. 4928.143(C)(2)(a), "If the Commission modifies and approves an application [for an electric security plan], the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer \* \* \* ". Accordingly, in the *ESP II Case*, DP&L withdrew its application for *ESP*

II, which was granted by the Commission, thereby terminating *ESP II*. *ESP II Case*, Finding and Order (Aug. 26, 2016).

{¶ 12} Additionally, pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application \* \* \* or if the commission disapproves an application \* \* \*, 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." Accordingly, on July 27, 2016, DP&L filed a motion in this proceeding to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b), and then filed proposed tariffs. Therefore, in this case, the Commission is only considering rehearing on its decision to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b). Assignments of error related to DP&L's withdrawal of *ESP II* and the Commission's granting of DP&L's withdrawal, thus terminating *ESP II*, are not relevant to this case and should have been raised in the *ESP II Case*. Likewise, assignments of error related to the service stability rider (SSR) are not relevant to this proceeding. The SSR was authorized in *ESP II* and all issues regarding the SSR should be raised in that proceeding.

{¶ 13} The assignments of error that are not relevant in this case include OPAE Edgemont's first assignment of error, in which OPAE Edgemont argues the Commission unlawfully acted outside the scope of its authority in granting DP&L's application to withdraw *ESP II*. Additionally, three of the assignments of error raised by OEG are moot or otherwise not relevant in this proceeding. First, OEG argues that the Commission erred by finding the Supreme Court of Ohio reversed the Commission's entire decision in the *ESP II Case*. Second, OEG asserts the Commission erred by allowing DP&L to withdraw and terminate *ESP II*. Third, OEG argues the Commission erred by failing to address OEG's request for a refund of the SSR. Each of these three assignments of error are regarding the Commission's decision to grant DP&L's withdrawal of *ESP II* pursuant to R.C. 4928.143(C)(2)(a).

{¶ 14} Finally, two of the assignments of error raised by IEU-Ohio are moot or otherwise not relevant in this proceeding. First, IEU-Ohio argues the Commission's Order was unlawful or unreasonable for failing to address IEU-Ohio's argument that the Commission should initiate a proceeding to refund the SSR. Second, IEU-Ohio asserts the Commission's Order was unlawful and unreasonable for failing to initiate a proceeding to account for amounts billed and collected under the SSR. Each of these assignments of error relate to *ESP II* and the SSR. Neither *ESP II* nor the SSR were litigated or considered in this case. Accordingly, rehearing is denied on these assignments of error for being moot or otherwise not relevant in this proceeding.

**A. Assignment of Error 1**

{¶ 15} OEG, OMA, and Kroger argue the Commission misapplied R.C. 4928.143(C)(2)(b) by allowing DP&L to recover competitive bid process energy and capacity costs through base generation rates and setting the fuel rider to zero, excluding amounts being reconciled from prior periods. OMA asserts it supports the policy rationale for the Commission's decision to maintain the market-based framework, but is concerned the Order sets a dangerous legal precedent that will enable utilities in future cases to pick provisions across multiple ESPs that they find most favorable.

{¶ 16} DP&L argues the parties 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 *ESP II* (e.g., Universal Service Rider, 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. Therefore, DP&L argues, granting rehearing on this assignment of error would not be in the public interest. DP&L asserts the Commission should reject this assignment of error. According to DP&L, granting rehearing on this assignment of error would disrupt the competitive market and related contracts, and result in rates that are significantly higher than those proposed by DP&L.

### CONCLUSION

{¶ 17} The Commission finds rehearing on these assignment of error should be denied. R.C. 4928.143(C)(2)(b) provides that if the utility terminates an application for 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, along with any expected increases or decreases in fuel costs from those contained in that offer. *ESP I* is DP&L's most recent SSO, and included in *ESP I* is a "bypassable fuel recovery rider to recover retail fuel and purchased power costs, based on least cost fuel and purchased power being allocated to retail customers." Stipulation (Feb. 24, 2009) at 3. Therefore, allowing DP&L to recover the cost of fuel and purchased power, including energy and capacity obtained through the competitive bidding process, is consistent with the provisions of *ESP I*. Moreover, the Commission authorized DP&L to recover the costs of energy and capacity obtained through the competitive bid process to serve non-shopping customers through base generation rates rather than the fuel and purchased power rider in order to minimize any rate impacts due to the different rate designs implemented in DP&L's legacy base generation rates and the fuel and purchased power rider.

{¶ 18} R.C. 4928.02(G) provides that it is the policy of the state of Ohio to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. We find that such flexible regulatory treatment is absolutely necessary in this instance to protect the public interest, maintain reasonable rates, ensure the integrity of existing contracts, and otherwise protect Ohio's competitive bid process for procuring wholesale power. Accordingly, we refuse to take any action which threatens the integrity of the competitive bid process.

{¶ 19} Further, all of DP&L's non-shopping customers are being served by energy and capacity purchased from the wholesale markets through the competitive bid process. DP&L customers benefit from the lesser rates resulting from the competitive bid process, and we find that the process should be maintained. We held in our Order, and now affirm, that DP&L's proposed tariffs should be approved as the proposed tariffs honor existing contracts

with winning competitive bid suppliers and maintain current PJM obligations for all suppliers, for the benefit of customers. Accordingly, rehearing on this assignment of error is denied.

**B. Assignment of Error 2**

{¶ 20} OEG, OMA, Kroger, and IEU-Ohio argue the Commission misapplied R.C. 4928.143(C)(2)(b) by retaining the transmission cost recovery riders from *ESP II*. In *ESP II*, the Commission authorized a bypassable transmission cost recovery rider (TCRR-B) and a nonbypassable transmission cost recovery rider (TCRR-N). IEU-Ohio asserts that regardless of the merit of the rationales offered by the Commission, the Commission is without authority to authorize the continuation of the TCRR-N now that *ESP II* has been terminated. IEU-Ohio avers the Commission is required, pursuant to R.C. 4928.143(C)(2)(b), to restore the fully bypassable TCRR-B, which was one of the provisions, terms, and conditions of *ESP I*. Further, IEU-Ohio argues the Commission is required to comply with its rules, including Ohio Adm.Code 4901:1-36-04(B), which requires transmission riders to be fully bypassable. Finally, IEU-Ohio asserts the TCRR-N is preempted by federal law because it blocks customers from taking service directly under PJM's open access transmission tariff (OATT) and because costs are not allocated and billed in the same manner as required by PJM's OATT.

{¶ 21} DP&L argues the parties ignore that existing competitive retail electric service (CRES) supply 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*. These contracts and winning bids assume that transmission costs will be incurred and recovered by DP&L through the TCRR-N. DP&L asserts that if the Commission were to eliminate the TCRR-N, ample lead time would be required to prepare and adjust existing and new contracts.

### CONCLUSION

{¶ 22} The Commission finds that rehearing on this assignment of error should be denied. The Revised Code requires the Commission to both return DP&L to *ESP I* and to recognize the emergence of competitive electricity markets through flexible regulatory treatment. We note that R.C. 4928.143(C)(2)(b) requires DP&L to return to *ESP I*, including the terms, conditions, and charges thereof. However, *ESP I* does not prohibit a nonbypassable transmission cost recovery rider. The Stipulation in this case expressly provides that DP&L may apply to the Commission for approval of separate rate riders to recover "TCRR costs" and "RTO costs not recovered in the TCRR." Stipulation (Feb. 24, 2009) at 11. The Stipulation does not address whether such riders should be bypassable or non-bypassable. Therefore, we find that the TCRR-N is authorized by the Stipulation in *ESP I*.

{¶ 23} Further, R.C. 4928.02(G) is clear that the Commission must "recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment." The Commission understands that terminating the TCRR-N could have a disruptive effect on electricity markets and that existing CRES supply contracts were entered into with the expectation that the TCRR-N would continue for the duration of *ESP II*. The TCRR-N was authorized for the duration of *ESP II*, so CRES providers and participants in the competitive bidding process to serve the SSO had a reasonable expectation that the TCRR-N would continue until May 31, 2017. DP&L and IGS each point out that existing CRES contracts, existing SSO auction winning bids, and related Master SSO Supply Agreements are all premised upon the structure of having a non-bypassable transmission cost recovery rider. Those contracts and winning bids assume that transmission costs will be recovered by DP&L through the TCRR-N until May 31, 2017.

{¶ 24} Finally, we find that some of the additional arguments raised by IEU-Ohio lack merit. IEU-Ohio argues the Commission violated its rules, including Ohio Adm.Code 4901:1-36-04(B), which requires transmission riders to be fully bypassable. However, Ohio Adm.Code 4901:1-36-02(B) expressly provides that the Commission may, upon an application



or a motion filed by a party, waive any requirement of the chapter, other than a requirement mandated by statute, for good cause shown. Regarding the TCRR-N, such a motion was made by DP&L and granted by the Commission. *ESP II; In re The Dayton Power and Light Co. for Waiver of Certain Commission Rules*, Case No. 12-429-EL-WVR. Additionally, IEU-Ohio argues the TCRR-N is preempted by federal law because it blocks customers from taking service under PJM's open access transmission tariff (OATT) and costs are not allocated and billed in the same manner as required by PJM's OATT. However, the TCRR-N never actually prohibited customers from obtaining transmission services from PJM's OATT.

**C. Assignment of Error 3**

{¶ 25} OMA, Kroger, OP&E Edgemont, OCC, IEU-Ohio, and OEG argue the Commission's Order is unjust or unreasonable because it authorizes DP&L to collect the RSC. They argue that through the RSC, DP&L will unlawfully collect the equivalent of transition revenues, much like the SSR in *ESP II* that was overturned by the Court. The parties assert the Commission should follow the holdings from the Court's decisions to strike down unlawful stability charges. They argue that these stability charges allow utilities to unlawfully collect the equivalent of transition revenues, in violation of R.C. 4928.38. OEG asserts that the Court's citation to the AEP Ohio ESP case can have only one meaning: that DP&L's SSR, which is a financial integrity charge equivalent to AEP Ohio's RSR, provides DP&L with unlawful transition revenue and is barred by R.C. 4928.38. Similarly, OCC accuses the Commission of ignoring the Court's opinion.

{¶ 26} OMA and Kroger then assert that DP&L's provider of last resort (POLR) obligations are not a legitimate justification for the RSC. They argue that since DP&L is not currently providing POLR services, it should not be permitted to collect costs that are intended to compensate it for providing that function. OMA and Kroger argue the Commission's justification of the RSC as a legitimate POLR charge is misplaced. They argue that auction participants provide POLR services because of their commitment to supply power through the competitive bid process. OMA and Kroger aver that 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.

{¶ 27} OPAE Edgemont argues the ESP, including the RSC, expired on December 31, 2012, pursuant to the terms of the Stipulation. *ESP I*, Opinion and Order at 5. Therefore, since the RSC expired, it is no longer a term, condition, or charge in *ESP I*.

{¶ 28} DP&L argues that the RSC is a lawful charge, agreed to by the parties, and implemented by the Commission. DP&L asserts that R.C. 4928.143(C)(2)(b) requires the Commission to implement "the provisions, terms, and conditions of the utility's most recent standard service offer." There is no dispute that *ESP I* is DP&L's most recent SSO. Further, there is no dispute that the RSC was a term of *ESP I*. Therefore, DP&L argues, the Commission properly authorized DP&L to implement the RSC as a term of its most recent SSO, pursuant to R.C. 4928.143(C)(2)(b).

{¶ 29} DP&L then argues that the parties' arguments are barred by R.C. 4903.10(B) and the doctrines of res judicata and collateral estoppel. DP&L notes that no party in this case sought rehearing of the Commission decision approving the Stipulation, and no party appealed the decision. It is well settled, and expressly provided in R.C. 4903.10(B), that a party cannot challenge a decision if it did not seek rehearing of that decision. Further, the intervenors arguments are also barred by the doctrines of collateral estoppel (issue preclusion) and res judicata (claim preclusion). "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." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶6 (2007). "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." *O'Nesti* at ¶7. "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). Further, "the 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). DP&L asserts that collateral estoppel applies to arguments that could have been brought in an earlier action. In this case, R.C. 4928.39 was in effect at the time *ESP I* was filed and litigated, and parties could have raised their arguments at the time but did not. DP&L asserts that since no party challenged the Commission's decision in *ESP I*, the intervenors are barred by the doctrines of res judicata and collateral estoppel from challenging the lawfulness of the RSC.

{¶ 30} OMA and Kroger assert that the doctrines of res judicata and collateral estoppel do not apply here. They argue 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." *State ex. rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 45, 529 N.E.2d 1255 (1988). Similarly, OCC argues the Commission's Order is unjust or unreasonable because the Commission held that parties were precluded from re-litigating the RSC due to the doctrines of res judicata and collateral estoppel.

### CONCLUSION

{¶ 31} The Commission finds the arguments in support of the assignment of error lack merit. Accordingly, rehearing on this assignment of error should be denied. DP&L's *ESP I* was approved by the Commission's adoption of a Stipulation signed by the parties to this case, including OCC, IEU-Ohio, OMA, Kroger, and OPAE. *ESP I*, Opinion and Order (June 24, 2009) at 13. The Stipulation, which includes the RSC, was adopted by the Commission after holding a hearing and providing parties the opportunity to fully litigate this case. No party argued that the Stipulation did not meet the Commission's three-prong test for review of a stipulation. The parties agreed that 1) the settlement was the product of serious

bargaining among capable, knowledgeable parties; 2) the settlement, as a package, benefits ratepayers and the public interest; and 3) the settlement package does not violate any important regulatory principle or practice. Stipulation (Feb. 24, 2009) at 1-2. The Stipulation states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Stipulation (Feb. 24, 2009) at 17-18.

{¶ 32} With respect to claims that the RSC violates R.C. 4928.38, the Commission notes that, instead of challenging or appealing the RSC as a violation of R.C. 4928.38, the parties signed "a complete settlement of all claims, defenses, issues, and objects." Stipulation (Feb. 24, 2009) at 17-18. The parties chose not to argue at the time that the RSC did not benefit ratepayers or the public interest, that it violated an important regulatory principle or practice, or that it violated R.C. 4928.38. When the Commission approved *ESP I*, R.C. 4928.38 prohibited the collection of transition revenues, yet no party opposed the Stipulation or appealed *ESP I* to the Court. If the parties believed the RSC unlawfully allowed DP&L to collect the equivalent of transition revenues, they had ample opportunity to oppose the stipulation or to appeal the matter to the Court. They did neither.

{¶ 33} Further, the doctrines of res judicata and collateral estoppel prohibit parties from relitigating the RSC. The RSC is a term, condition, or charge of *ESP I* that was litigated along with the rest of *ESP I*. "Collateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings." *Tedesco v. Glenbeigh Hosp. of Cleveland, Inc.* (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908. Collateral estoppel, otherwise known as issue preclusion, prohibits the parties from relitigating the RSC in this case.

{¶ 34} Further, the Commission subsequently addressed the question of whether the RSC violates R.C. 4928.38. We determined on December 19, 2012, in this proceeding, that "the

RSC is a provider of last resort (POLR) charge and not a transition charge \*\*\*." Entry (Dec. 19, 2012) at 4. No party filed an application for rehearing regarding that ruling. Therefore, the assignments of error claiming that the RSC is an unlawful transition charge constitute an untimely application for rehearing to our December 19, 2012 Entry and are barred by R.C. 4903.10.

{¶ 35} Finally, the RSC has already been affirmed by the Court. On December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved rate stabilization surcharge into two separate components: (1) the RSC; and (2) an environmental investment rider (EIR). As noted above, the RSC was authorized to pay DP&L for costs associated with its POLR obligations. The Commission determined in Case No. 05-276-EL-AIR, that the RSC and EIR were both fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). The parties then appealed the Commission's decision, including the RSC. The Supreme Court of Ohio affirmed the Commission's decision and upheld both the RSC<sup>1</sup> and the EIR. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276. Accordingly, we find the assignment of error lacks merit, is barred by the doctrines of res judicata and collateral estoppel, and should otherwise be denied.

#### **D. Assignment of Error 4**

{¶ 36} OCC argues in its November 14, 2016, application for rehearing that the Commission erred by not granting and holding rehearing on the matters specified in OCC's previous application for rehearing. OCC asserts that the errors in the Commission's Order, for which OCC filed its application for rehearing, were clear and the Commission should have granted rehearing. Similarly, OCC argues that the Commission erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, OCC argues, the Commission failed to fulfill its duty to hear matters pending before it without

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<sup>1</sup> Although the Court upheld the RSC, it remanded the matter to the Commission to remove the RSC from DP&L's distribution tariffs and place it in DP&L's generation tariffs. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 at \*349-350, ¶41.

unreasonable delay and with due regard to the rights and interests of all litigants before it. OCC asserts the Commission's Entry on Rehearing permits the Commission to evade a timely review and reconsideration of its order by the Ohio Supreme Court and precludes parties from exercising their right to appeal a Commission order, which is a right established, *inter alia*, under R.C. 4903.10, 4903.11, and 4903.13.

{¶ 37} DP&L asserts that the Commission has a longstanding practice of granting applications for rehearing for further consideration, which allows the Commission to review the myriad of complex issues facing Ohio's diverse public utilities. DP&L argues that this practice is not only consistent with R.C. 4903.10, but has been expressly permitted by the Supreme Court of Ohio. *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶19. DP&L avers that it was lawful and reasonable for the Commission to take additional time to consider the issues raised in the many applications for rehearing filed in this case.

### CONCLUSION

{¶ 38} The Commission finds that the assignment of error lacks merit and rehearing should be denied. As set forth above, the Commission has fully considered the assignments of error raised by OCC in its September 26, 2016 application for rehearing. However, as we discussed above, OCC's assignments of error lack merit and we have denied rehearing on those assignments of error. The Commission's Order issued on August 26, 2016 is required by R.C. 4928.143(C)(2)(b), which provides that the Commission shall implement "the provisions, terms, and conditions of the utility's most recent standard service offer." Further, there has been no unreasonable delay in this case, and no party has been prejudiced by the Commission's granting of rehearing for the limited purpose of further consideration of the matters specified in the applications for rehearing.

IV. ORDER

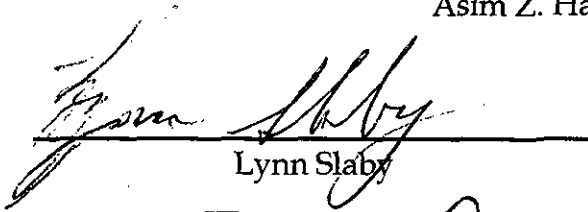
{¶ 39} It is, therefore,

{¶ 40} ORDERED, That the applications for rehearing be denied. It is, further,

{¶ 41} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Asim Z. Haque, Chairman

  
Lynn Slaby

  
M. Beth Trombold

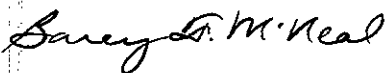
  
Thomas W. Johnson

  
M. Howard Petricoff

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Entered in the Journal

**DEC 14 2016**

  
Barcy F. McNeal

Barcy F. McNeal  
Secretary