FILE

IN THE SUPREME COURT OF OHIO 17-0205

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	:	Supreme Court Case No. 2017-_____
	:	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	Public Utilities Commission of Ohio Case Nos. 12-426-EL-SSO, *et al.*
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	:	
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	:	
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	:	

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NOTICE OF APPEAL OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

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SUPREME COURT OF OHIO

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NOTICE OF APPEAL OF APPELLANT
INDUSTRIAL ENERGY USERS-OHIO

Appellant, Industrial Energy Users-Ohio ("IEU-Ohio" or "Appellant"), hereby gives its notice of appeal, pursuant to R.C. 4903.11 and R.C. 4903.13, S.Ct.Prac.R. 10.02(A), and Ohio Adm. Code Sections 4901-1-02 and 4901-1-36, to the Supreme Court of Ohio and Appellee, the Public Utilities Commission of Ohio ("Commission"), from the Commission's August 26, 2016 Finding and Order ("Order on Remand") (Attachment A) and Seventh Entry on Rehearing issued December 14, 2016 (Attachment B). IEU-Ohio was and is a party of record in Case Nos. 12-426-EL-SSO, *et al.*, and timely filed its Application for Rehearing of the Order on Remand on September 26, 2016 (Attachment C). IEU-Ohio's timely Application for Rehearing was granted in the Sixth Entry on Rehearing for purposes of allowing the Commission additional time to consider IEU-Ohio's arguments. IEU-Ohio's Application for Rehearing was then denied in the Seventh Entry on Rehearing issued on December 14, 2016.

The Order on Remand and Seventh Entry on Rehearing follow this Court's decision on June 20, 2016 reversing the Commission's authorization of The Dayton Power and Light Company's ("DP&L") second electric security plan ("ESP"). *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490. In that appeal, IEU-Ohio and the Office of the Ohio Consumers' Counsel ("OCC") argued that DP&L's second ESP contained an unlawful charge, the Service Stability Rider ("SSR"), which collected $110 million from customers on a nonbypassable basis. Among other illegalities, IEU-Ohio and OCC demonstrated that the SSR was an unlawful transition charge. This Court reversed the Commission citing its recent decision with respect to Ohio Power Company's ("AEP-Ohio") second ESP where the Court held that the Commission unlawfully authorized a transition charge for AEP-Ohio. *Id.* (*citing In re Application of Columbus S. Power Co.*, 2016-Ohio-1608).

Following this Court's decision reversing the authorization of DP&L's transition charge, DP&L sought to withdraw its second ESP and return to rates it claimed were "consistent" with the rates in effect under its first ESP. In the Order on Remand, the Commission found that the Court's decision required the Commission to order the removal of the SSR charge from DP&L's rates. The Commission further found that its order to DP&L to remove the SSR charges from DP&L's rates triggered DP&L's right to withdraw from its ESP under R.C. 4928.143(C)(2)(a) and therefore the Commission granted DP&L's motion to withdraw its second ESP. In the Order on Remand and the Seventh Entry on Rehearing, the Commission also failed to account for the revenue DP&L collected under the unlawful SSR charge.

The Commission's decisions are unlawful and unreasonable for the reasons set out in the following assignments of error:

1. The Commission's decisions are unlawful and unreasonable because the condition permitting an electric distribution utility ("EDU") to withdraw its ESP application under R.C. 4928.143(C)(2)(a) is not satisfied when the Commission eliminates a previously authorized rider as a result of a Supreme Court decision reversing that authorization.
2. The Commission's decisions are unlawful and unreasonable because the Commission failed to initiate a proceeding to account for the amounts billed and collected under the unlawful SSR charge and to prospectively adjust the rates of DP&L in violation of R.C. 4905.22, 4928.02, and 4928.06.

3. The Commission's decisions are unlawful and unreasonable because the Commission failed to find that *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider. To the extent the Court determines that *Keco* and the decisions extending *Keco* to Commission proceedings precludes the Commission from initiating a proceeding and making prospective adjustments to the rates of DP&L to account for the revenue collected under an unlawful rider, the Court should overrule the Court's and the Commission's decisions extending the holding of *Keco* to Commission proceedings and direct the Commission to initiate proceedings affording prospective rate relief.

WHEREFORE, Appellant IEU-Ohio respectfully submits that the Commission's Order on Remand and Seventh Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed. The cases should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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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. 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 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

FINDING AND ORDER

Entered in the Journal on August 26, 2016

I. SUMMARY

{¶ 1} Based upon the opinion of the Supreme Court of Ohio reversing the Commission's Opinion and Order in this case, the Commission modifies The Dayton Power and Light Company's electric security plan. Further, the Commission grants the motion filed by The Dayton Power and Light Company to withdraw its application for an electric security plan and finds that this case should be dismissed.

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 Case No. 08-1094-EL-SSO, the Commission approved a stipulation and recommendation to establish DP&L's first ESP (*ESP I*). *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al., (*ESP I case*), Opinion and Order (June 24, 2009).

{¶ 5} Thereafter, by Order issued on September 4, 2013, in this case, 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).

{¶ 6} 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 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order.

{¶ 7} Thereafter, on July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for an ESP in this matter. On August 11, 2016, memoranda contra the motion to withdraw its application for an ESP were filed by the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE Edgemont), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA).

In their memoranda contra, some parties combined arguments regarding DP&L's proposed tariffs to implement *ESP I* with arguments regarding DP&L's motion to withdraw *ESP II*. In this case, the Commission is only considering DP&L's motion to withdraw *ESP II*. Any arguments regarding DP&L's proposal to implement *ESP I* will be considered by the Commission in the *ESP I case*. On August 18, 2016, DP&L filed its reply to the memoranda contra regarding its motion to withdraw *ESP II*.

III. ARGUMENTS BY THE PARTIES

{¶ 8} Pursuant to R.C. 4928.143(C)(2)(a), "[i]f 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 under this section or a standard service offer under section 4928.142 of the Revised Code." DP&L filed a motion to withdraw its application for an ESP, thereby terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a), arguing the Commission modified and approved *ESP II* when it authorized the ESP on September 4, 2013. Contemporaneous with its motion to withdraw *ESP II*, DP&L also filed a motion pursuant to R.C. 4928.143(C)(2)(b) to implement *ESP I*.

{¶ 9} DP&L asserts that even if it did not file a motion to withdraw *ESP II*, the Supreme Court of Ohio reversed *ESP II* in total, which effectively terminates its application for an ESP in this case. According to DP&L, the Supreme Court of Ohio reversed all aspects of *ESP II*. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. Therefore, the Commission should grant its motion to withdraw *ESP II*, thereby terminating it, and issue an order implementing *ESP I*. DP&L avers that continuing *ESP II* without the SSR would be inconsistent with the Supreme Court of Ohio's opinion and would make it very difficult for DP&L to continue to provide safe and reliable electric service. DP&L notes that recent actions by credit agencies demonstrate the possible adverse effects if DP&L does not receive adequate rate relief. DP&L argues that R.C. 4928.143(C)(2)(a) imposes no time limit on its right to withdraw an application for an ESP and, therefore, the Commission should grant its motion.

{¶ 10} OMAEG, Kroger, OCC, IEU-Ohio, OPAE Edgemont, OEG, and RESA argue that the Supreme Court of Ohio reversed just the SSR and not the entire *ESP II*. They assert the Supreme Court of Ohio's opinion reversed *ESP II* on the authority of *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d---, which means the scope of the Court's decision is limited by the Court's findings in *In re Application of Columbus S. Power Co.*, ---Ohio St.3d---, 2016-Ohio-1608, ---N.E.3d. The Supreme Court of Ohio found that financial integrity charges provide utilities with the equivalent of transition revenue in violation of R.C. 4928.38. Accordingly, the parties assert that the Commission should require *ESP II* to continue without the SSR.

{¶ 11} Additionally, OMAEG, Kroger, OCC, IEU-Ohio, OPAE Edgemont, OEG, and RESA argue that R.C. 4928.143(C)(2)(a) does not provide DP&L with authority to withdraw *ESP II* because the Commission did not modify *ESP II*, the Supreme Court of Ohio did. Therefore, under the plain language of the statute, DP&L cannot withdraw *ESP II*. Further, the parties argue it would be an unreasonable reading of the statute to find that it provides DP&L with an everlasting right to withdraw an ESP that was modified and approved by the Commission. The parties assert that a reasonable reading of R.C. 4928.143(C)(2)(a) is that the electric utility may withdraw a modified ESP within a reasonable period of time, or only while the ESP is pending prior to the approval of final tariffs. They argue it would be unreasonable in this case to allow DP&L to terminate *ESP II* after being effective for nearly three years.

IV. COMMISSION CONCLUSION

{¶ 12} The Commission finds that *ESP II* should be modified to remove the SSR, based upon the opinion of the Supreme Court of Ohio reversing the Commission's Order in this case. On June 20, 2016, the Supreme Court of Ohio reversed the Order of the Commission approving *ESP II*. Thereafter, on July 19, 2016, a mandate from the Supreme Court of Ohio was filed in this case requiring the Commission to modify its order or issue a new order. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. It is well established that, when the Supreme Court of Ohio reverses and

remands an order of the Commission, the reversal is not self-executing and the Commission must modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172. Accordingly, pursuant to the Court's reversal of our decision modifying and approving DP&L's proposed *ESP II*, the Commission hereby modifies its order authorizing *ESP II* in order to eliminate the SSR.

{¶ 13} Further, the Supreme Court of Ohio has established that when the Commission modifies an order approving an ESP, it effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. R.C. 4928.143(C)(2)(a) provides that "[i]f the Commission modifies and approves an application [for an ESP], 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." On July 26, 2016, DP&L filed a motion to withdraw its application for an ESP, terminating *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 14} 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.

{¶ 15} In conclusion, the Commission grants DP&L's motion to withdraw its application for an ESP, thereby terminating *ESP II*. Accordingly, the Commission finds that this case should be dismissed.

V. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That DP&L's motion to withdraw its application for an ESP, thereby terminating it, be granted. It is, further,

{¶ 18} ORDERED, That this case be dismissed. It is, further,

{¶ 19} ORDERED, That a copy of this Finding and Order 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

GAP/BAM/sc

Entered in the Journal AUG 26 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

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. 12-426-EL-SSO
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CONCURRING OPINION OF COMMISSIONER THOMAS W. JOHNSON

{¶ 1} The Commission's decision reaches the appropriate outcome in today's ruling, and does so in a manner that is well reasoned. I concur with its outcome. R.C. 4928.143(C)(2)(a)'s assertion that "[i]f the commission *modifies and approves* an application" for an ESP, the EDU "may withdraw the application, thereby terminating it" (emphasis added) has been the subject of many different interpretations by multiple intervenors. I merely wish to express one Commissioner's impression of this provision.

{¶ 2} While the Commission is not deciding today exactly when a modification triggers the right of an EDU to withdraw an ESP, I would like to express my belief that DP&L has had the right to withdraw their second ESP starting when it was originally

modified and approved. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. I am not opining as to when this right to withdraw terminates. I merely express an opinion that this is a right created under the statute.

Thomas W. Johnson, Commissioner

TWJ/sc

Entered in the Journal
AUG 26 2016

Barcy F. McNeal
Secretary

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. 12-426-EL-SSO
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IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY TO ESTABLISH TARIFF RIDERS.	CASE NO. 12-672-EL-RDR

SEVENTH 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 service to customers, including a firm supply of electric generation service. 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 Order issued on September 4, 2013, in this case, the Commission modified and approved DP&L's application for its second ESP (*ESP II*). Included as a term of *ESP II* was a service stability rider (SSR) for DP&L's financial integrity.

{¶ 5} On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the Commission's decision 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 19, 2016, the mandate issued by the Supreme Court of Ohio was filed in this case.

{¶ 6} On July 27, 2016, DP&L filed a motion and memorandum in support to withdraw its application for *ESP II*. Thereafter, on August 11, 2016, memoranda contra to DP&L's motion to withdraw *ESP II* were filed by the Ohio Manufacturers' Association Energy Group (OMAEG), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Partners for Affordable Energy and Edgemont Neighborhood Coalition (OPAE/Edgemont), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA).

{¶ 7} By Order issued on August 26, 2016, the Commission granted DP&L's application to withdraw *ESP II*, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). The Commission then dismissed this case.

{¶ 8} 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.

{¶ 9} On September 23 and 26, 2016, applications for rehearing were filed by OPAE/Edgemont, IEU-Ohio, OEG, OMAEG, Kroger, and OCC. Thereafter, on October 3 and 6, 2016, DP&L filed memoranda contra to the applications for rehearing.

{¶ 10} 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. The Commission found that sufficient reason was set forth by the parties to warrant further consideration of the matters raised in the applications for rehearing.

{¶ 11} However, 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

A. *Assignment of Error 1*

{¶ 12} OMAEG, Kroger, and OEG argue the Commission's order was unjust and unreasonable because the Commission found that the Supreme Court of Ohio reversed in total the Commission's order authorizing *ESP II*. OMAEG, Kroger, and OEG each argue the Commission erred when it found the Court reversed *ESP II* in total. They assert the Supreme Court of Ohio only reversed the SSR, but not the remaining provisions, terms, and conditions of *ESP II*.

{¶ 13} DP&L responds by arguing that the Supreme Court of Ohio fully reversed *ESP II*. DP&L argues the Court could have reversed in part or modified the Commission's

order authorizing *ESP II* but did not. Further, the Court could have identified that it found just the SSR to be unlawful or unreasonable, but it did not. DP&L argues the parties' assertion that the Court's decision was limited just to the SSR or transition costs is plainly false. The Court's opinion does not instruct the Commission to excise the SSR from DP&L's tariff sheets and does not order rates to be lowered. Regardless, DP&L notes that the Commission specifically modified *ESP II* to eliminate the SSR, and that pursuant to R.C. 4928.143(C)(2)(a), the Commission's modification of *ESP II* to eliminate the SSR provided DP&L with the right to withdraw and terminate *ESP II*. However, DP&L asserts that it has maintained the unilateral right to withdraw *ESP II* at any time since the Commission's modification and approval of *ESP II* on September 4, 2013.

CONCLUSION

{¶ 14} The Commission finds that the parties' assignment of error lacks merit. The Commission recognized that the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. Order at 5, citing *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * 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 a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). Therefore, pursuant to the Supreme Court's mandate, the Commission modified "its order authorizing *ESP II* in order to eliminate the SSR." Finding and Order (Aug. 26, 2016) at 5. Having modified *ESP II*, as ordered by the Court, the Commission acknowledged and granted DP&L's previously-filed application to withdraw *ESP II*, pursuant to R.C. 4928.143(C)(2)(a).

{¶ 15} As the Supreme Court of Ohio has held, "[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. Further, the Court has made it clear that, when the Commission modifies an order approving an ESP, the Commission effectively modifies the EDU's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. Any modification, whether in part or in total, of an application for an ESP triggers the utility's right to withdraw the application, thereby terminating it, pursuant to R.C. 4928.143(C)(2)(a). Therefore, whether the Court reversed just the SSR or the ESP in total is moot, as in either instance, the Commission was required to modify its Order approving *ESP II*, which then provided DP&L the right to withdraw *ESP II*, pursuant R.C. 4928.143(C)(2)(a), even if such right did not already exist.

B. Assignment of Error 2

{¶ 16} OEG, OPAE/Edgemont, OMAEG, Kroger, OCC, and IEU-Ohio argue the Commission's Order is unjust or unreasonable because the Commission allowed DP&L to withdraw its application for *ESP II* in violation of R.C. 4928.143(C)(2)(a). The parties aver that while the Commission was mandated to terminate the billing and collection of the SSR, the Commission erred when it apparently found that R.C. 4928.143(C)(2)(a) required the Commission to grant DP&L's withdrawal of *ESP II* upon elimination of the SSR. IEU-Ohio argues that because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, the Commission order terminating the SSR is ministerial only. "A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done." *State ex. rel. Trauger v. Nash*, 66 Ohio St. 612, 618 (1902). Further, "a ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts." *State v. Moretti*, 1974 Ohio App. Lexis 3838 at *8 (10th Dist. Ct. App., Apr. 9, 1974).

{¶ 17} OCC argues the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP within a relatively short period of time after implementing the ESP. OCC asserts that withdrawal of an ESP after 32 months is inconsistent with the law and the General Assembly's intent. OCC then argues the Commission violated R.C. 4928.143(C)(2)(b) by replacing the SSR with a charge that similarly allows the unlawful recovery of the equivalent of transition revenues.

{¶ 18} OMAEG, Kroger, and OPAE/Edgemont argue the Commission erred by impermissibly treating a Court-ordered reversal of a provision of *ESP II* as having the same effect as a Commission-ordered modification to the ESP. They argue that under R.C. 4928.143(C)(2)(a), the utility may terminate and withdraw its ESP only "[i]f *the Commission* modifies and approves an application" for an ESP (emphasis added). They assert the statute does not grant the utility the right to terminate and withdraw an ESP in response to a modification made by the Supreme Court of Ohio. Additionally, OMAEG and Kroger argue the Commission erred in finding that a utility retains an everlasting right to terminate an ESP. They assert the utility's right to withdraw and terminate an ESP ends upon the filing of tariffs.

{¶ 19} OMAEG, Kroger, and OPAE/Edgemont then aver the outcome of the Commission's determination in this case is to dilute the potency of the direct right of appeal granted by R.C. 4903.13, and has effectively allowed DP&L to override the Court's ruling by moving to withdraw and terminate *ESP II*.

{¶ 20} OEG argues that R.C. 4928.143(C)(2)(a) provides the utility with a right to withdraw an ESP only when a proposed ESP is modified by the Commission. OEG asserts the ESP in this case was not *an application* for an ESP, but a final and fully implemented ESP. Much like OCC, OEG argues the right to withdraw an ESP does not extend indefinitely, but OEG's argument rests on the premise that once the ESP is implemented, it is no longer an "application under division (C)(1) [for an ESP]" as contemplated in R.C. 4928.143(C)(2)(a).

{¶ 21} DP&L argues the Commission's decision to allow DP&L to withdraw *ESP II* is both mandated by law and necessary to allow DP&L to maintain its financial integrity so that it can continue to provide safe and reliable electric service. DP&L asserts the Commission correctly held that R.C. 4928.143(C)(2)(a) establishes DP&L's right to withdraw and terminate *ESP II*. R.C. 4928.143(C)(2)(a) is clear, if the Commission modifies and approves an application for an ESP, the utility may withdraw the application, thereby terminating the ESP. Additionally, DP&L avers the Court has long held that if the Commission makes a modification to an ESP, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶26.

{¶ 22} Further, DP&L argues that R.C. 4928.143(C)(2)(a) contains no limit on the utility's right to withdraw its application for an ESP. DP&L asserts that, although it sought to withdraw its application after the Court's ruling to reverse the Commission's decision to approve ESP II, 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 of Ohio. In each instance, DP&L argues, the utility may withdraw the ESP.

CONCLUSION

{¶ 23} The Commission finds that rehearing on this assignment of error should be denied. As we noted above, the Supreme Court of Ohio's opinion was not self-executing and required the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117 ("* * * 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 a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order."). We are not persuaded, however, that the

Commission consideration of any matter on remand is simply a ministerial act, and IEU-Ohio has cited no precedent in support of this claim. In fact, in many cases, the Commission takes additional comments or holds additional hearings on remand. The Commission modified its Order approving *ESP II* to eliminate the SSR, as ordered by the Court. Because the Commission made a modification to the ESP, the plain language of R.C. 4928.143(C)(2)(a) allows DP&L to withdraw and terminate *ESP II*. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶24-30. Accordingly, pursuant to R.C. 4928.143(C)(2)(a), the Commission granted DP&L's application to withdraw and terminate *ESP II*.

{¶ 24} Further, regarding OEG's argument that the Commission modified DP&L's fully implemented ESP, not its *application* for an ESP, the Court has held that when the Commission modifies an order approving an ESP, it effectively modifies the utility's application for an ESP. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056 at ¶29. By modifying its Order approving *ESP II*, the Commission modified DP&L's application for the ESP, thereby triggering the provisions of R.C. 4928.143(C)(2)(a).

{¶ 25} Additionally, regarding OCC's argument that the General Assembly intended for R.C. 4928.143(C)(2)(a) to allow a utility to withdraw and terminate an ESP only within a relatively short period of time, we note that the Supreme Court of Ohio has stated that it would "not weigh in on whether [the utility] could collect ESP rates for some period of time and then withdraw the plan." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). The Court was referring to whether the utility has an indefinite right to withdraw an ESP after the Commission issues its initial Order modifying and approving an ESP. In the present case, the Commission modified *ESP II* by Order issued on August 26, 2016, and then granted the withdrawal in the same Order. Therefore, like the Supreme Court of Ohio, the Commission does not need to weigh in on whether DP&L could collect the ESP for some period of time and then withdraw it, because that issue is

not present here. In this case, *ESP II* was effectively withdrawn immediately upon the Commission's August 26, 2016 modification of *ESP II*.

C. *Assignment of Error 3*

{¶ 26} OCC and IEU-Ohio argue the Commission's Order granting DP&L's withdrawal and termination of *ESP II* violated R.C. 4903.09 for failing to set forth the reasons prompting the decision arrived at. IEU-Ohio asserts it sought a Commission order initiating a proceeding to determine the amount that DP&L billed and collected under the SSR and to establish future rate reductions to return the collected amount to customers. OCC and IEU-Ohio assert the Commission's Order was unlawful and unreasonable for both failing to address their argument and for failing to initiate such a proceeding.

{¶ 27} DP&L argues the Commission's Order authorizing DP&L to withdraw and terminate its *ESP II* application was consistent with and required by R.C. 4928.143(C)(2)(a). DP&L asserts the Commission followed the plain language and meaning of R.C. 4928.143(C)(2)(a). The Commission fully explained its reasoning, therefore, DP&L argues, rehearing should be denied.

CONCLUSION

{¶ 28} The Commission finds that the arguments raised by OCC and IEU-Ohio lack merit. Pursuant to R.C. 4928.143(C)(2)(a), if the Commission modifies an ESP, the utility may withdraw the ESP, thereby terminating it. OCC and IEU-Ohio cite to no other conditions or qualifications contained in the Revised Code that the utility must satisfy for it to withdraw an ESP. In this case, the Court issued an opinion requiring the Commission to modify its order or issue a new order. *Cleveland Elec. Illuminating Co. v. Public Utilities Commission* (Ohio 1976) 46 Ohio St.2d 105, 346 N.E.2d 778, 75 O.O.2d 172 at 116-117. The Commission modified its Order, which provided DP&L the right under R.C. 4928.143(C)(2)(a) to withdraw *ESP II*. DP&L exercised its right and filed a notice of

withdrawal of *ESP II*, which became effective immediately upon the Commission's August 26, 2016 Order modifying the ESP. Therefore, the SSR, which was not reconcilable, was terminated along with the rest of *ESP II*.

{¶ 29} Further, IEU-Ohio's previous request for a proceeding to determine the amount that DP&L billed and collected under the SSR, and to establish future rate reductions to return the collected amount to customers, is moot. The Commission cannot make a prospective adjustment to the SSR to return previously collected revenues to customers because the SSR has been terminated and no longer exists. Accordingly, rehearing on this assignment of error should be denied.

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

{¶ 30} OEG and IEU-Ohio argue the Commission's Order is unjust and unreasonable because it failed to require DP&L to refund all SSR charges paid by customers to DP&L from the time the SSR was initially approved by the Commission. IEU-Ohio asserts that the Court's opinion in *Keco* does not bind the Commission from initiating a proceeding to refund amounts collected under the SSR to customers. Further, if the Commission finds that its prior decisions extending *Keco* preclude such relief, the Commission or the Supreme Court of Ohio should overrule the cases extending *Keco* to Commission decisions. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 31} Further, IEU-Ohio notes the Supreme Court of Ohio reversed *ESP II* on the authority of *In re Application of Columbus S. Power. Co.*, ___ Ohio St.3d ___, 2016-Ohio-1608, ___ N.E.3d ___" (*Columbus Southern*). Therefore, the Commission must look to *Columbus Southern* to guide the Commission's actions following the Court's reversal of the SSR. In *Columbus Southern*, the Court directed the Commission on remand to make prospective adjustments to AEP-Ohio's balance of deferred capacity charges to account

for the revenue AEP-Ohio unlawfully collected under the rider. *Columbus Southern* at ¶39-40. Therefore, IEU-Ohio argues the Commission must initiate a proceeding to account for the effects of the SSR and adjust rates accordingly. Such a proceeding, IEU-Ohio argues, would not violated *Keco*.

{¶ 32} Further, IEU-Ohio argues this case is distinguishable from *Keco* in two respects. First, *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court found to be unlawful. Second, in *Keco* the plaintiff was seeking restitution. IEU-Ohio asserts the Commission could authorize prospective relief to reduce future rates to eliminate the effect of the SSR, which would not violate *Keco* or frustrate the precedent prohibiting retroactive ratemaking. Additionally, even if the Commission determines that *Keco* prohibits a proceeding to make prospective adjustments to reduce DP&L's rates to account for the revenue collected under the SSR, the Commission or the Supreme Court of Ohio should overrule those decisions and initiate such a proceeding.

CONCLUSION

{¶ 33} The Commission finds the arguments raised by IEU-Ohio lack merit and the application for rehearing should be denied. In the first instance, the arguments are moot, as DP&L withdrew and terminated the SSR along with the rest of *ESP II*. In the second instance, IEU-Ohio's request would violate long-held precedent established in *Keco* and *Lucas County* prohibiting retroactive ratemaking. *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957); *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997).

{¶ 34} The issue is moot because DP&L withdrew and terminated the SSR along with the rest of *ESP II*. As noted above, R.C. 4928.143(C)(2)(a) provides that if the Commission modifies and approves an application for an ESP, the utility may withdraw its application, thereby terminating the ESP. In this case, the Commission modified its

order approving *ESP II* on remand from the Court. DP&L exercised its right and withdrew *ESP II*, which was effective immediately upon the Commission's Order modifying *ESP II*. The termination of *ESP II* includes the terms, conditions, and charges included in *ESP II*. The SSR was a term of *ESP II* and was terminated along with it. The facts in this case are different from AEP Ohio's rate stability rider (RSR) addressed by the Court in *Columbus Southern*. In *Columbus Southern*, the Court remanded the matter to the Commission to properly adjust the RSR, which was intended to be reconcilable and to extend past the term of AEP Ohio's second ESP, on a going forward basis to account for the Court's opinion. *Columbus Southern* at *7, ¶33, ("AEP will recover its costs in the following manner: * * * collecting any remaining balance of the deferred costs (plus carrying charges) after the ESP period ends."). However, in the present case, the Commission cannot adjust the SSR on a going forward basis because DP&L withdrew and terminated it along with the rest of *ESP II*. There are no prospective rates to adjust because the SSR was terminated. Further, the relief requested by IEU-Ohio would violate the Court's and this Commission's long-held precedent in *Keco* and *Lucas County* prohibiting retroactive ratemaking.

E. Assignment of Error 5

{¶ 35} 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 previous application for rehearing, were clear and the Commission should have granted rehearing. Further, OCC argues the Commission failed to fulfill its duty to hear matters pending before it without 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 rights to appeal, which is a right established, inter alia, under R.C. 4903.10, 4903.11, and 4903.13

{¶ 36} 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 is 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

{¶ 37} The Commission finds that this assignment of error is moot and that 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. As we discussed above, OCC's assignments of error lack merit and we have denied rehearing on those assignments of error. Further, we note that DP&L has ceased collecting charges under the SSR pursuant to our August 26, 2016 Finding and Order terminating *ESP II*. Accordingly, OCC has not demonstrated any prejudice or undue delay as the result of our October 12, 2016 Entry on Rehearing in this proceeding.

IV. ORDER

{¶ 38} It is, therefore,

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

{¶ 40} 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

BAM/sc

Entered in the Journal

DEC 14 2016

Barcy F. McNeal

Barcy F. McNeal
Secretary

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer.	)))	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 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

APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

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SEPTEMBER 26, 2016

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

Under R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") seeks rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") on August 26, 2016 for the following reasons:

1. **ASSIGNMENT OF ERROR I:**
   The Order permitting the Dayton Power and Light Company to withdraw its electric security plan application is unlawful because the condition permitting the electric distribution utility to withdraw its application under R.C. 4928.143(C)(2)(a) is not satisfied when the Commission eliminates a previously

authorized rider as a result of a Supreme Court decision reversing that authorization.

2. **ASSIGNMENT OF ERROR II:**
The Finding and Order is unlawful because it failed to explain its rationale and respond to contrary positions regarding the request of Industrial Energy Users-Ohio to begin a proceeding to determine an appropriate mechanism to adjust the rates of the Dayton Power and Light Company to account for billing and collection of the unlawful Service Stability Rider.

3. **ASSIGNMENT OF ERROR III:**
The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful Service Stability Rider and to prospectively adjust the rates of the Dayton Power and Light Company in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission's failure to initiate such a proceeding is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and direct that proceedings affording prospective relief be initiated.

The reasons supporting this Application for Rehearing are set out in the accompanying Memorandum in Support.

Respectfully submitted,

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

I. INTRODUCTION

When the Supreme Court of Ohio reversed the Commission's order authorizing the Service Stability Rider ("SSR"), the Commission was mandated to implement that decision and eliminate the unlawful rider from the electric security plan ("ESP") of the Dayton Power and Light Company ("DP&L"). Further, the reversal of the order required the Commission to establish a proceeding to determine the amount billed and collected by DP&L under the unlawful authorization and direct that the amount be returned to customers through adjustments to future rates. The Court's decision, however, did not

satisfy the statutory requirement permitting DP&L to withdraw its ESP application. When the Commission issued its order granting DP&L's motion to withdraw its ESP and dismissed the proceeding without determining the amount that DP&L had unlawfully billed and collected under the SSR, the Commission erred.

Accordingly, the Commission should grant rehearing, reverse its decision to dismiss the proceeding, and direct DP&L to implement the current ESP with the exception of the unlawful SSR. Further, the Commission should initiate a proceeding to determine the amount that DP&L billed and collected under the SSR and direct DP&L to prospectively reduce rates to account for that amount.

II. FACTS

On September 4, 2013, the Commission modified and approved an application for an ESP for DP&L in an Opinion and Order ("Opinion"). As a term of the ESP, the Commission authorized DP&L to bill and collect $110 million annually under the guise of a stability rider, the SSR. The Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU-Ohio") sought rehearing of the authorization of the SSR. When the Commission denied rehearing of the authorization of the rider, IEU-Ohio and OCC filed appeals of the authorization with the Supreme Court of Ohio.

IEU-Ohio and OCC also sought stays of the authorization of the billing and collection of the SSR from the Commission and the Court both before and after they sought appellate review. These motions were denied.

On June 20, 2016, the Supreme Court of Ohio found that the Commission unlawfully authorized DP&L to bill and collect transition revenue or its equivalent under the guise of a "stability rider." *In re Application of Dayton Power and Light Co.*, Slip Op. 2016-Ohio-3490 (June 20, 2016). On June 21, 2016, IEU-Ohio and OCC sought

expedited orders terminating the billing and collection of the rider. DP&L initially resisted those efforts by claiming that the Clerk of the Court had not issued the mandate of the Court to the Commission. The Clerk of the Court then issued the mandate on July 6, 2016, thus removing the claimed procedural barrier.

While the motion to terminate billing and collection of the SSR was pending, DP&L filed three motions seeking orders that would authorize it to withdraw its current ESP and to implement rates "consistent" with the rates in effect prior to the Commission's decision implementing the current ESP.[1] In support of its motion seeking to withdraw the current ESP, DP&L claimed that it had the option to withdraw its ESP because the Commission modified and approved its application for the current ESP and that the Supreme Court of Ohio "reversed in total" the Commission's decision approving the ESP. ESP II, Motion of the Dayton Power and Light Company to Withdraw its Application in this Matter, Memorandum in Support at 1 ("DP&L Motion to Withdraw"). In the other two motions, DP&L sought orders to implement rates that are "consistent" with DP&L's 2013 rates, asserting that the Commission should grant the motion under R.C. 4928.143(C)(2). ESP II, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 1-2; ESP I, Motion of the Dayton Power and Light Company to Implement Previously Authorized Rates, Memorandum in Support at 1-2 (collectively, "DP&L Motions to Implement Rates").

[1] DP&L filed the motion to withdraw in the docket of its current ESP. *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 12-426-EL-SSO, *et al.*, will be referred to as ESP II or the current ESP. DP&L filed two motions seeking to implement rates consistent with its prior ESP, one in the ESP II docket, and a second in the docket for its first ESP application. *In re the Matter of The Dayton Power and Light Company for Approval of Its Electric Security Plan,* Case Nos. 08-1094-EL-SSO, *et al.* For ease of reference, the ESP approved in Case Nos. 08-1094-EL-SSO, *et al.*, will be referred to as ESP I or the prior ESP.

Additionally, DP&L asserted that R.C. 4928.141 and 4905.32 require the Commission to permit DP&L to implement "consistent" rates because the Court reversed the order authorizing the current ESP "in total." *See, e.g.*, ESP I, DP&L Motion to Implement Rates, Memorandum in Support at 2.

On August 1, 2016, DP&L filed a "Notice" setting out the rates that it sought authorization to implement. ESP I, The Dayton Power and Light Company's Notice of Filing Proposed Tariffs (Aug. 1, 2016). Included in the Notice were tariff sheets that would retain standard service offer generation rates based on the outcomes of the auctions and the nonbypassable transmission rates approved as terms of the current ESP. *Id.* at 2. DP&L further sought authority to bill and collect the nonbypassable Rate Stabilization Charge ("RSC"), a rider that remained in effect in September 2013 over the protests of IEU-Ohio and others. *Id.*; *see* ESP I, Entry (Dec. 19, 2012).

IEU-Ohio opposed DP&L's Motion to Withdraw and recommended that the Commission substantially modify the rates that DP&L filed in its Notice if the Commission did permit the withdrawal. ESP II, Memorandum in Opposition to the Motions of the Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates (Aug. 11, 2016). As IEU-Ohio explained in its Memorandum opposing DP&L's Motions, the Court's decision required that the Commission issue orders to DP&L to terminate the SSR, but did not permit DP&L to withdraw its ESP application under R.C. 4928.143(C)(2)(a). *Id.* at 4-7. Additionally, the relief that DP&L sought, *i.e.*, to implement rates, terms, and conditions "consistent" with its first electric security plan, is not authorized by Ohio law.[2] *Id.* at 7-13. Finally, IEU-

[2] In a separate application for rehearing, IEU-Ohio seeks rehearing of the Commission's order in the ESP I case permitting DP&L to cherry pick the terms and conditions it seeks to implement.

Ohio moved for an order initiating a proceeding to determine the amount that DP&L unlawfully billed and collected under the unlawful SSR and to reduce rates to return that amount to customers. *Id.* at 4 n.2 (incorporating IEU-Ohio's Comments filed on August 12, 2016).

On August 26, 2016, the Commission modified the order authorizing ESP II to eliminate the SSR. Finding and Order at 5. It then granted DP&L's motion to withdraw its ESP II application. *Id.* at 5-6. According to the Commission, it had "no choice but to grant DP&L's motion and accept the withdrawal of ESP II." *Id.* at 5.

III. ASSIGNMENT OF ERROR I:

The Order permitting the Dayton Power and Light Company to withdraw its electric security plan application is unlawful because the condition permitting the electric distribution utility to withdraw its application under R.C. 4928.143(C)(2)(a) is not satisfied when the Commission eliminates a previously authorized rider as a result of a Supreme Court decision reversing that authorization.

In the Finding and Order, the Commission does not explain what the modification is that requires it to "accept the withdrawal of ESP II," but implies that DP&L filed its motion "in apparent anticipation that the Commission would modify its order or issue a new order" as a result of the Court's decision reversing the authorization of the SSR.[3] Finding and Order at 5. The Finding and Order then proceeds to explain that the Commission was required to issue a new order which replaced the reversed order. *Id.* at 5-6, citing *Cleveland Elec. Ill. Co. v. Pub. Utils. Comm'n of Ohio*, 46 Ohio St.2d 105, 116-17 (1976). While the Commission was mandated to terminate the billing and collection of the SSR by the Court's decision, the Commission erred when it apparently

[3] As demonstrated in IEU-Ohio's opposition to the motion to withdraw, DP&L's alternative claim that the Commission's modification and approval of the ESP application permits DP&L to withdraw also is without merit. ESP II, Memorandum in Opposition to the Motions of the Dayton Power and Light Company to Withdraw its ESP Application and to Implement Previously Authorized Rates at 5.

found that its order eliminating the SSR from the current ESP required it to grant DP&L's motion to withdraw under R.C. 4928.143(C)(2)(a).

In relevant part, R.C. 4928.143(C)(2)(a) provides, "If the commission modifies and approves an application under division (C)(1) of [R.C. 4928.143], the electric distribution utility may withdraw its application, thereby terminating it." As the Supreme Court of Ohio has stated, "the clear purpose of R.C. 4928.143(C)(2)(a) ... [is] to allow a utility to withdraw its proposed ESP if it dislikes the commission's modifications." *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 8 (2015). Thus, the circumstance permitting an electric distribution utility ("EDU") to withdraw its ESP application requires a modification of the application by the Commission.

Once the Court reversed the authorization and the Clerk of the Court issued the mandate, the Commission was required to issue orders directing DP&L to bring its rates into compliance with the Court's order. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n of Ohio,* 46 Ohio St.2d 105, 116-17 (1976); *see, also, Nolan v. Nolan*, 11 Ohio St.3d 1 (1984) (syllabus) ("Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.")

Because the Court's decision required the Commission to issue an order terminating the billing and collection of the SSR, the Commission order terminating the SSR is ministerial only. "A ministerial act may be defined to be one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to the exercise of his own judgment upon the propriety of the act being done." *State, ex rel. Trauger, v. Nash*, 66 Ohio St. 612, 618 (1902). "[A]

ministerial duty is an absolute, certain and imperative duty imposed by law upon a public officer involving merely execution of a specific duty arising from fixed and designated facts. As such, ministerial duties are necessarily mandatory when required to be performed." *State v. Moretti*, 1974 Ohio App. Lexis 3838 at *8 (10th Dist. Ct. App. Apr. 9, 1974). When required to perform a ministerial act, the Commission has "no latitude" or discretion in the discharge of that act. *Hamilton Brownfields Redevelopment, LLC, v. Zaino*, 2005 Ohio Tax Lexis 1452 at *7-8 (Bd. Tax. App. Oct. 28, 2005).

Because the Commission was acting in a ministerial capacity, the Commission was without discretion or latitude when it addressed the Court's order reversing the SSR; it was required to take the actions directed by the Court to eliminate the SSR. By law, the Commission was acting at the direction of the Court.

Because the Commission was acting in a ministerial capacity only, its order eliminating the SSR does not satisfy the statutory requirement that permits an EDU to withdraw its ESP application. That section requires the Commission to modify the application. In this instance, the Commission was directed to terminate the authorization of the SSR and could not take any other action. To the extent there was a modification of ESP II, the Court, not the Commission, ordered the modification. Thus, the requirement of R.C. 4928.143(C)(2)(a) that the Commission modify the ESP application is not satisfied.

In summary, an EDU may withdraw its ESP application only if the Commission modifies and approves the application. When the Commission is acting on a Court order directing the Commission to terminate the authorization of a rider, the

Commission is acting in a ministerial capacity only and has not modified the ESP application within the meaning of R.C. 4928.143(C)(2)(a). Accordingly, the Commission should grant rehearing and reverse its orders granting DP&L's motion to withdraw and dismissing the ESP II case.

IV. ASSIGNMENT OF ERROR II:

The Finding and Order is unlawful because it failed to explain its rationale and respond to contrary positions regarding the request of Industrial Energy Users-Ohio to begin a proceeding to determine an appropriate mechanism to adjust the rates of the Dayton Power and Light Company to account for billing and collection of the unlawful Service Stability Rider.

As part of its response to DP&L's motions, IEU-Ohio sought an order initiating a proceeding to determine the amount that DP&L billed and collected under the unlawful SSR and to establish rate reductions to return that amount to customers. *Id.* at 4 n.2 (incorporating IEU-Ohio's Comments filed on August 12, 2016). As IEU-Ohio demonstrated, the decision of the Supreme Court of Ohio ordering AEP-Ohio to properly account for the amounts it recovered under its unlawful stability rider and the Commission's recent decision permitting AEP-Ohio to bill and collect carrying charges retroactive to the date of the Commission's unlawful change in the carrying charge rate require the Commission to provide the requested relief in this case as well. ESP I, IEU-Ohio Comments at 13-16. Although the request for Commission action to adjust rates prospectively to account for the SSR collections was properly presented to the Commission, the Finding and Order did not identify the request or address the merits of the arguments in support of it. The effect of the order, thus, is to deny the request without explanation.

The Commission is under a requirement to file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at." R.C. 4903.09.

Under this requirement, the Commission must "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence." *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 519 (2011). Like the requirement of the federal Administrative Procedure Act that "[t]he record shall show the ruling on each finding, conclusion, or exception presented," 5 U.S.C. § 557(c), this requirement to address each issue presented is designed "to preserve objections in the record and inform the parties and any reviewing body of the disposition of the case and the grounds upon which the agency's 'decision' is based." *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 681 (7th Cir.), *cert. denied*, 400 U.S. 823 (1970).

In this case, the Commission's failure to address the request to commence a proceeding to address a prospective adjustment to rates does not meet the requirement of R.C. 4903.09. Although IEU-Ohio presented a request to the Commission to initiate a proceeding to account for the amounts billed and collected under the unlawful SSR and prospectively reduce rates, the Commission denied that request without explanation. Having failed to explain its rationale for denying customers relief from the unlawful orders, the Commission erred and should grant rehearing and initiate the requested proceeding.

V. ASSIGNMENT OF ERROR III:

The Finding and Order is unlawful because it failed to initiate a proceeding to account for the amounts billed and collected under the unlawful Service Stability Rider and to prospectively adjust the rates of the Dayton Power and Light Company in violation of R.C. 4905.22, 4928.02, and 4928.06; to the extent that the Commission's failure to initiate such a proceeding is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider. To the extent that the Commission determines that its prior decisions relying

on *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and direct that proceedings affording prospective rate relief be initiated.

As noted above, IEU-Ohio sought a Commission order initiating a proceeding to account for the amounts that DP&L billed and collected under the SSR and to prospectively reduce rates. In response to the request of IEU-Ohio for the Commission to initiate a proceeding to determine the amount that was unlawfully collected under the SSR, DP&L, citing *Keco Industries v. Cincinnati and Suburban Telephone Co.,* 166 Ohio St. 254 (1957) and cases such as *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997) extending *Keco* to Commission proceedings, argued that an order requiring a refund would constitute retroactive ratemaking. ESP II, Reply of the Dayton Power and Light Company in Support of Motion to Withdraw ESP II Application and Motion to Implement Previously Authorized Rates at 21-24 (Aug. 18, 2016) ("DP&L Reply"). By failing to address IEU-Ohio's request, the Finding and Order implicitly denied it.

The Commission's denial of the request was in error. To the extent that the Commission denied the request based on *Keco* and the related cases, the Commission should find that *Keco* does not bind the Commission from providing the requested relief. If the Commission determines that its prior decisions extending *Keco* preclude such relief, the Commission (or on review the Supreme Court of Ohio) should overrule the cases extending *Keco* that effectively deny customers relief from the injury caused by the Commission's unlawful authorization of the SSR.

A. The Court's decision reversing the authorization of the SSR and recent Commission precedent require the Commission to initiate a

proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount

Despite DP&L's claim that the Commission cannot adjust rates to account for the amounts it billed and collected under the unlawful authorization of the SSR, the Court has implicitly ordered the Commission to initiate such a proceeding. The Commission's failure to comply with the Court's order was in error.

In reversing the Commission's authorization of the SSR, the Court held, "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 ___." ["*Columbus Southern*"]. *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490, ¶ 1. Thus, taken in its entirety, the Court's decision directs the Commission to look towards the *Columbus Southern* case to guide the Commission's actions following the reversal of the authorization of the SSR.

In the *Columbus Southern* case, the Commission authorized the Retail Stability Rider ("RSR") for AEP-Ohio. (The RSR and SSR were substantially similar, and the Commission explicitly relied on its rationale for authorizing the RSR when it authorized the SSR. ESP II, Opinion and Order at 17, 22, 25; *see, also, Columbus Southern*, S.Ct. Case No. 2013-521, Merit Brief of Amicus Curiae DP&L in Support of Appellee PUCO at 6 (Oct. 21, 2013) (DP&L asserted that the record supporting AEP-Ohio's RSR "closely resembles" the record supporting its SSR).) However, the Court found that the nature of the RSR served the same purpose as a transition charge and concluded that the authorization of the RSR unlawfully allowed AEP-Ohio to collect transition revenue or its equivalent. *Columbus Southern*, at ¶ 22-25. The Court then directed the Commission on remand to make prospective adjustments to AEP-Ohio's balance of deferred

capacity charges to account for the revenue AEP-Ohio unlawfully collected under the rider. *Id.* at ¶ 39-40.

In its decisions reversing DP&L's SSR, the Court followed its decision in the *Columbus Southern* case. By supporting its decision by reference to the *Columbus Southern* case, the Court implicitly directed the Commission to initiate a proceeding to account for the effects of the unlawful SSR and adjust rates accordingly.

Although the Court ordered an adjustment to an existing deferral in *Columbus Southern*, the decision should not be read to limit the scope of the remedy that the Commission may order in this case. As the Commission determined, it may initiate a procedure by which it will prospectively adjust rates to account for the effects of an order subsequently found by the Court to be unlawful. The order establishing the procedure arose in connection with AEP-Ohio's first ESP case.

In an August 1, 2012 order, the Commission prospectively modified the interest rate that was to be applied to the outstanding deferrals from AEP-Ohio's first ESP, reducing the interest rate from 11.15% based on AEP-Ohio's weighted-average cost of capital ("WACC") to 5.34% based on AEP-Ohio's cost of long-term debt. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order (Aug. 1, 2012) ("*AEP PIRR Case*"). Because that modification occurred after the termination of AEP-Ohio's *ESP I Case*, the Court reversed the Commission's order reducing the interest rate and remanded the case to the Commission "for reinstatement of the WACC rate." *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 43.

On May 23, 2016, AEP-Ohio proposed rates that reflected reinstating the 11.15% interest rate as of August 1, 2012, the date the Commission ordered the reduction. On June 29, 2016, the Commission approved AEP-Ohio's rates that reflected resetting interest rates as of August 1, 2012. *AEP PIRR Case*, Entry at 2-3 (June 29, 2016). The Commission noted that "[a]lthough the Court did not specify an effective date for reinstatement of the WACC rate, we find that the Court's decision, taken in its entirety, requires that the WACC rate be reinstated in full, such that AEP Ohio is able to recover its PIRR deferral balance, at the WACC rate, for the entire recovery period." *Id.* That is, in its June 29, 2016 order, the Commission authorized a prospective change to AEP-Ohio's Phase-In Recovery Rider ("PIRR") rates based on a recalculation of revenue lost due to the interest rate reduction between August 1, 2012 and June 29, 2016. In authorizing the prospective change to rates based on revenue lost over the prior four years, the Commission noted that the Court did not "find that *Keco* precluded the collection" of this revenue lost due to the Commission's unlawful action reversed by the Court. *Id.*

These same factors are present here and therefore warrant prospective modifications to DP&L's rates to remedy the collection of approximately $294 million under the SSR. Taken in its entirety, the Court's decision reversed the SSR, but did not indicate that *Keco* would bar a prospective adjustment of the rates. Based on the Commission's precedent of initiating a proceeding by which rates may be adjusted for the effects of a prior order that the Court has deemed unlawful, the Commission should have granted the relief requested by IEU-Ohio.

Accordingly, the Commission erred when it implicitly denied the request of IEU-Ohio to initiate the proceeding to provide the requested relief to customers. The Commission should grant rehearing and initiate the requested proceeding to account for the amounts that DP&L billed and collected under the unlawful SSR and to prospectively reduce rates based on that accounting.

B. To the extent that the Commission's failure to initiate a proceeding to account for the amounts billed and collected under the unlawful rider and prospectively reduce DP&L's rates to account for the identified amount is based on *Keco Industries v. Cincinnati and Suburban Telephone Co.*, 166 Ohio St. 254 (1957), the Commission should find that *Keco* does not preclude such a proceeding

DP&L seeks to bill and keep the proceeds it received under the Commission's unlawful authorization of the SSR on the claim that *Keco* precludes the Commission from authorizing prospective rate reductions. As evidenced by two important distinctions between *Keco* and the relief requested in this case, however, *Keco* does not warrant the Commission's refusal to initiate the requested proceeding to account for the amounts billed and collected under the unlawful authorization of the SSR.

First, *Keco* addressed the scope of the remedies available in an action brought before a court of general jurisdiction. As the Court explained in *Keco*, the issue was whether a civil action for restitution based on unjust enrichment would lie to recover an increase in rates charged by a public utility when the order authorizing the increase was subsequently reversed by the Court. *Keco*, 166 Ohio St. at 255-56. To resolve this issue, the Court noted that only it was authorized to review utility rates ordered by the Commission and that the utility was required to charge the rates on file with the Commission. *Id.* at 256-57. The Court further noted that R.C. 4903.16 provided a procedure for suspending rates by posting a bond pending an appeal. Based on that

review of the statutes, the Court concluded the General Assembly had abrogated the common law remedy of restitution for amounts paid under an unlawful Commission order through an action in a general division court. *Id.* at 259. Thus, the express issue addressed in *Keco* was limited to whether a general division court had the authority to order restitution of rates the Court had found to be unlawful. *Keco* did not address the Commission's authority to provide a prospective rate adjustment.

A second substantive distinction between this case and *Keco* is that the plaintiff was seeking restitution. In equity, restitution is awarded to a plaintiff when the defendant has been unjustly enriched at the expense of the plaintiff; it is a remedy designed to restore both parties to their original condition or to return something to the owner of it or the person entitled to it upon the reversal of setting aside of a judgment or order of court under which it was taken from him. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278 (2005); *Wayne Mutual Ins. Co. v. McNabb*, 2016-Ohio-153, ¶ 36 (4th Dist. Ct. App. Jan. 11, 2016); *Black's Law Dictionary* 1477 (1968). In contrast to restitution, the prospective rate relief, which is sought in this case, does not restore individual customers to the place they would have been if the order had not been issued; a rate order reducing DP&L rates may or may not restore individual customers to the position they would have been in. Instead, the requested relief reduces rates to eliminate the effect of the prior unlawful order.

Thus, the *Keco* decision is strictly limited to whether the remedy of restitution will lie as a cause of action in a general division court. IEU-Ohio is seeking relief through a Commission order, and the relief it is seeking is not restitution. Rather, it has requested an order that the Commission initiate a proceeding to account for the effects of the

unlawful SSR and order prospective rate reductions. Accordingly, DP&L's reliance on *Keco* is misplaced.[4]

C. To the extent that the Commission determines that its prior decisions extending *Keco* do preclude the Commission from initiating a proceeding and making prospective adjustments to reduce the rates of the Dayton Power and Light Company to account for the revenue collected under an unlawful rider, the Commission (or the Supreme Court of Ohio) should overrule those decisions and initiate such a proceeding

In addition to relying on *Keco* to oppose the request of IEU-Ohio for the Commission to initiate a proceeding to account for the amount billed and collected under the unlawful SSR and to reduce rates prospectively to account for that amount, DP&L also relies on several Court and Commission decisions refusing to order refunds that cite *Keco* as the legal basis for that denial. DP&L Reply at 21-22.

As discussed above, the Court has already directed the Commission to initiate a proceeding to account for the amounts billed and collected under the SSR and prospectively adjust rates. If the Commission, nonetheless, is under the mistaken belief that it is required to deny customers the relief to which they are entitled based on the

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[4] The distinction between providing restitution and a prospective adjustment to rates is demonstrated in the Court's reasoning in *Lucas County Commissioners v. Public Utilities Commission of Ohio*, 80 Ohio St.3d 344 (1997). In that case, the Commission dismissed a complaint seeking relief from rates that had terminated prior to the filing of the complaint. On appeal, the Court upheld the Commission's decision to dismiss the complaint, noting that the complaint had been filed after the challenged rates had ended. Again, the holding was limited; the Court concluded that R.C. 4905.26 and the rate making statutes did not authorize the Commission to order refunds or service credits to consumers based on expired rate programs. *Lucas County Commissioners*, 80 Ohio St.3d at 347. The Court went on to explain that utility ratemaking is prospective only and that retroactive ratemaking was not permitted. *Id.* at 348.

However, the Court also recognized that rates may be adjusted to recover previously deferred revenue without violating the proscription against retroactive ratemaking. The rate at issue in the *Lucas County Commissioners* case, in contrast, had been discontinued and there was no revenue from the challenged program against which the Commission could balance alleged overpayments or order a credit. *Id.* at 348-49.

In this instance, the Commission can adjust the rates billed and collected by DP&L to account for the amounts that were billed and collected under the unlawful SSR. The rates and charges of an ESP continue. These rates and charges provide a mechanism by which the Commission can balance the overpayments or order a credit. Thus, nothing in *Lucas County Commissioners* dictates a decision denying the initiation of a proceeding to determine the amount that was billed and collected under the unlawful SSR and a prospective adjustment of rates.

cases extending *Keco* to Commission proceedings, it (or on appeal, the Court) should overrule those decisions.

1. The decisions extending *Keco* are premised on two claims: (1) that *Keco* should be extended to Commission proceedings to prevent the Commission from prospectively adjusting rates to account for an order that has been ruled unlawful by the Court; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates

According to DP&L, the cases extending *Keco* to Commission proceedings prevent the Commission from refunding of the amounts billed and collected under the unlawful SSR. Under this line of cases extending *Keco* to Commission proceedings, the Court has held that "[n]either the commission nor [the] court can order a refund of previously approved rates." *Green Cove Resort I Owners' Assoc. v. Pub. Utils. Comm'n of Ohio*, 103 Ohio St.3d 125, 130 (2004) (citing *Keco*). See, also, *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 516 (2011) and *Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 121 Ohio St. 3d 362, 367 (2009). Similarly, the Commission has stated that it "cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified." *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 36 (Oct. 3, 2011). See, also, *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry on Rehearing at 6 (June 22, 2000) (citing *Keco*).

Typical of the discussion in the cases extending *Keco* to Commission proceedings is the Court's reasoning in a decision addressing the lawfulness of AEP-Ohio's first ESP. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512 (2011). In that case, the Court found that the Commission had authorized AEP-Ohio to retroactively increase its rates by $63 million in violation of the *Keco* "rule" prohibiting retroactive ratemaking. *Id.* at 514-15. The Court then held that this finding was a "hollow victory" for customers because *Keco* prohibited the granting of a refund. "Any apparent unfairness ... remains a policy decision mandated by the larger legislative scheme. As *Keco* and other cases have noted, the statutes protect against unlawfully high rates by allowing stays." *Id.* at 516. Thus, the refusal of the Court or the Commission to direct prospective rate adjustments turns on two claims: (1) that the "doctrine" of *Keco* applies to Commission proceedings; and (2) that the General Assembly has provided a workable and meaningful regulatory scheme that provides customers with an adequate means to protect themselves from the effects of an order authorizing unlawfully excessive rates.

As discussed in the next two sections, neither claim survives examination. Moreover, there is no legitimate interest to sustaining this unreasonable and unworkable "doctrine" that substantially injures utility customers. Accordingly, the Commission (or the Court) should overturn those cases extending *Keco* to Commission proceedings because (1) the decisions were wrongly decided, (2) the decisions defy practical workability, and (3) abandoning the precedents would not create an undue hardship for those who have relied upon them. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 228 (2003).

2. The cases extending *Keco* to prohibit the Commission from prospectively accounting for the effects of an order subsequently found to be unlawful are wrongly decided

As discussed above, the cases denying relief "based on the doctrine set forth in *Keco*," *Green Cove Resort I Owners Association v. Pub. Utils. Comm'n of Ohio*, 103 Ohio St.3d at 130, extend *Keco* beyond its holding. The Court in *Keco* concluded only that the General Assembly had abrogated the common law remedy of restitution for amounts paid under a Commission-ordered rate after the Court reversed the rate order through an action in a court of general jurisdiction. A decision addressing the scope of the jurisdiction of a court to hear a claim for restitution, however, does not determine the jurisdiction of the Commission or the remedies the Commission may order when the Court has found that a previously authorized rate is unlawful.

The scope of the Commission's authority is governed by Title 49. *Dayton Communications Corp.* v. *Pub. Utils. Comm'n of Ohio,* 64 Ohio St. 2d 302, 307 (1980). Under R.C. 4928.02, the State Electric Services Policy, the Commission is to "[e]nsure ... reasonably priced electricity." See, also, R.C. 4928.06(A) (Commission to ensure implementation of R.C. 4928.02). Under R.C. 4905.22, "no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission." Further, the Commission is empowered to determine if any rate or charge is "in any respect unjust, unreasonable, ... or in violation of law" and to remedy that violation. R.C. 4905.26. *See, also*, R.C. 4928.16 (providing the Commission with jurisdiction to address compliance with provision of Chapter 4928 under R.C. 4905.26). By law, therefore, the rates imposed by the Commission must be just and reasonable and the Commission has the authority to adjust rates to bring them into compliance with Ohio law.

Although Ohio law requires rates to be just and reasonable, the Commission often has refused to order the rates to be adjusted to account for the amounts billed and collected under the rate the Court has determined to be unlawfully authorized on the ground that it cannot order a "refund." *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 36 (Oct. 3, 2011). Yet, this Commission and Court-imposed limitation is inconsistent with the statutory authority of the Commission to ensure that rates are just and reasonable, and nothing in Title 49 of the Ohio Revised Code explicitly provides that the Commission cannot initiate a proceeding to provide prospective relief to account for effects of the authorization of a rate increase that the Court has found was unlawful and to prospectively reduce rates.[5] To the contrary, a failure to adjust rates to account for the effects of a rate subsequently deemed unlawful assures that rates are not just and reasonable, in violation of R.C. 4928.02 and 4905.22.

Further, the Supreme Court has on at least two occasions directed the Commission to adjust rates prospectively to account for the effects of a rate that the Court found to be unlawful. As discussed above, the Court held in *Columbus Southern* that the Commission unlawfully authorized the billing and collection of transition revenue or its equivalent under the guise of a stability rider and ordered the Commission on

[5] Likewise, R.C. 4905.32 does not prevent the Commission from initiating a proceeding to account for the amounts billed and collected under an unlawful rate and prospectively reduce rates. Under that section, a utility must charge the rates on file with the Commission. There is no provision that prevents the adjustment of rates for the amounts billed and collected under the unlawfully authorized rate. To find otherwise would insert a term that the section also prohibits an order to adjust the existing rate to account for the effects of a prior unlawful order. By inserting an additional implied term, however, the Commission would violate the Court's longstanding rule that it will not add or subtract words from a statute. *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 515 (2014).

remand to determine the amount and reduce the balance of deferred capacity costs to be billed and collected by AEP-Ohio. *Columbus Southern*, ¶ 40. Similarly, in *Columbus Southern Power Co. v. Public Utilities Commission of Ohio*, 67 Ohio St.3d 535 (1993), the Commission reversed a decision in which the Commission had deferred recovery of amounts found to be lawfully included in rates. The Court then held that the utility may charge to recover previously deferred revenues without violating *Keco* when the recovery was pursuant to rates authorized by an initial Commission order that the Commission had since erroneously limited.

Additionally, the Commission itself recently authorized a prospective change to AEP-Ohio's PIRR rates based on a recalculation of revenue lost due to the interest rate reduction between August 1, 2012 and June 29, 2016. *AEP PIRR Case*, Entry at 7-8 (June 29, 2016). In support of that finding, the Commission found that the Court's decision taken in its entirety required the recalculation for the entire period and that the Court had not found that *Keco* precluded the collection of the amounts that were not collected during the period under which the reversed order was in effect. *Id.* at 7.

Thus, the "doctrine of *Keco*" that prevents prospective relief is not supported by Ohio law. The holding in *Keco* itself is not applicable to Commission proceedings; rather it addresses the remedies available in a court of general jurisdiction and holds that an action for restitution, not prospective rate relief, will not lie. Further, the cases extending *Keco* are inconsistent Ohio legal requirements that authorize Commission review of rates and charges to determine if they are just and reasonable and require the Commission ensure that those rates and charges of a utility are just and reasonable. And despite the "doctrine of *Keco*," the Court and the Commission have found the

Commission may take those actions necessary to correct the effects of a rate found to be unlawful. As this discussion demonstrates, the cases extending *Keco* to deny prospective relief from the effects of an unlawful Commission order are wrongly decided.

3. The extension of *Keco* to prevent rate relief is unworkable under current Commission practice

a. The delay in review amplifies the injury suffered by customers required to pay the rates authorized under an order subsequently found to be unlawful

When the Commission routinely grants rehearing for further consideration and then takes no action on matters for months or years, the parties that have successfully pursued an appeal are afforded little or no remedy when the Commission wrongly applies *Keco*. The dimensions of both the delay and amounts the utilities bill and collect due to the extension of *Keco* are staggering.

Once the Commission issues an order that a party objects to, R.C. 4903.10 dictates the rehearing process a party must follow to challenge the order. A party must initially seek rehearing by the Commission. If a party seeks rehearing and the Commission does not respond to a rehearing application within thirty days, the rehearing application is deemed denied by operation of law. If the Commission does respond to an application for rehearing within the thirty-day window, it may deny or grant the application for rehearing. If the Commission grants rehearing within the thirty-day window,

> [the commission] shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in

> any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.

While R.C. 4903.10 imposes a thirty-day timeframe on a Commission response to an application for rehearing, the Court has approved a process by which the Commission grants rehearing for the purpose of further consideration. *State ex rel. Consumers' Counsel, v. Pub. Utils. Comm'n of Ohio*, 102 Ohio St.3d 301 (2004). Using this authority, the Commission routinely grants applications for rehearing for the purpose of further consideration. While these grants of rehearing for further consideration are pending, injured parties are prevented from securing relief from the Court until the Commission eventually issues a decision, which often simply rejects any remaining issues.

The delays caused by grants of rehearing for further consideration in this case were substantial. The Commission issued its Opinion and Order in this case on September 4, 2013. (In an Entry Nunc Pro Tunc issued on September 6, 2013, the Commission substantially revised the Opinion and Order.) Parties timely sought rehearing of the SSR on October 4, 2013. The Commission granted rehearing for further consideration of the SSR on October 23, 2013. DP&L then filed tariff sheets to implement the SSR on November 15, 2013, and the Commission approved them in an entry issued on December 13, 2013 even though it had not yet addressed the applications for rehearing on which it had granted rehearing of the lawfulness and reasonableness of the rider. The SSR rate became effective on January 1, 2014, again while the Commission further considered the lawfulness of the SSR. On March 19, 2014, the Commission then issued an entry on rehearing denying the applications for rehearing of IEU-Ohio and OCC. Due to concerns raised in the second entry on

rehearing, IEU-Ohio and OCC each sought rehearing of the second entry on rehearing on April 18, 2014. The Commission again granted rehearing for the purpose of additional consideration on May 7, 2014. On June 4, 2014, the Commission issued its fourth entry on rehearing denying the applications for rehearing of IEU-Ohio and OCC. Due to alleged errors in the fourth entry on rehearing, OCC filed a third application for rehearing on July 1, 2014. That application for rehearing was denied on July 23, 2014. Thus, the Commission granted rehearing for the purpose of reconsideration twice in this case for a total period of approximately six months. During all but two of those months, DP&L billed and collected the SSR.

This case is not unique; delay before the Commission issues an order that may be appealed has become the norm. When the Commission increased AEP-Ohio's electric bills to fund above-market generation-related wholesale capacity payments to its affiliated generation business, for example, the Commission issued five entries granting itself additional time for consideration of issues that consumed nearly three years following the Commission's initial decision. When granting rehearing in each of the five instances, the Commission only said that it was doing so to give itself more time to consider the applications for rehearing and it did so without identifying any additional evidence it would take. The Commission's fifth order granting rehearing for further consideration in response to challenges to the Commission's authority to regulate wholesale electric rates and charges established under federal law, remained open for two months; the first Commission order granting rehearing for further consideration of an application for rehearing filed by AEP-Ohio and challenging the jurisdiction of the Commission to proceed on the merits of the application was "further considered" by the

Commission without resolution for over two years. *See In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-COI (entries granting rehearing for additional consideration issued on Feb. 2, 2011, Feb. 2, 2012, Apr. 11, 2012, July 11, 2012, and Aug. 15, 2012). Many of these open matters were not resolved until the Commission issued a decision on October 17, 2012. *Id.*

In the 2011 AEP-Ohio ESP case, the Commission issued an Opinion and Order on August 8, 2012. On October 3, 2012, the Commission granted rehearing for further consideration of claims that the Opinion and Order was unlawful. "Further consideration" continued until January 30, 2013. Meanwhile the contested rate increase became effective on September 1, 2012. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*

While the appellate process itself comes with its own delays, the combination of the rehearing and appellate processes translates into huge customer losses. In this case, the Commission authorized the rider for 36 months at an annual rate of $110 million a year. Due in part to Commission delay in addressing applications for rehearing, no party was permitted to file a notice of appeal until July 23, 2014 when the Commission issued its Fifth Entry on Rehearing. On August 29, 2014, IEU-Ohio filed its Notice of Appeal. The Court issued its decision on July 20, 2016. Although under a Court mandate to terminate the billing and collection of the SSR, the Commission took no action to suspend the charge until it issued the Finding and Order on August 26,

2016. That Finding and Order and a related one in the ESP I case, however, permitted DP&L to withdraw its current ESP and to delay filing complying tariffs for another seven days. ESP II, Finding and Order at 6; ESP I, Finding and Order at 12. DP&L filed the new tariffs with an effective date of September 1, 2016. Thus, DP&L was permitted to bill and collect unlawful transition revenue or its equivalent under the guise of a stability rider from January 1, 2014 until September 1, 2016. Because the unlawful authorization of the SSR permitted DP&L to bill customers approximately $9.2 million a month, customers have been billed or will be billed over $294 million in SSR charges during the 32 months that the SSR was unlawfully authorized.

Large customer losses resulting from the refusal to adjust rates prospectively for the effects of rates found to be unlawful have occurred in other cases as well. In the AEP-Ohio ESP I case, the Court acknowledged that the Commission's order resulted in the illegal collection of $63 million which would not be returned to customers. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 514 (2011). In a subsequent appeal in the same ESP case following the Commission's refusal to prospectively adjust the phase-in rider to account for all amounts unlawfully authorized in provider of last resort charges, the Court acknowledged that its extension of *Keco* to deny prospective adjustment of rates for the effects of a Commission order permitted AEP-Ohio to benefit from a "windfall" of $368 million. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 462 (2014).[6]

[6] In related proceedings, the Commission on remand of its order lowering the carrying charge associated with a rider to recover a deferral balance created by the ESP I order increased AEP-Ohio's recovery over the life of the rider by at least $130 million. *AEP PIRR Case*, Entry at 7 (June 29, 2016).

b. *The Commission refused to stay its unlawful orders, and the stay available under R.C. 4903.16 provides no effective customer relief from the effects of an unlawful authorization of a rate or charge*

By seeking a stay either from the Commission or the Court, parties such as IEU-Ohio in this case and others have sought to limit the injury from an order of the Commission that they deemed beyond the Commission's authority while the Commission reconsidered its decision and the appellate process moved forward. The standards under which a party may seek a stay, however, do not provide a workable method of limiting the injury caused by an unlawful Commission order.

The Commission will issue a stay if it finds that there has been a strong showing that a moving party is likely to prevail on the merits, that the party seeking the stay shows that it will suffer irreparable harm if the stay is not granted, that the stay will not cause substantial harm to other parties, and that the stay is otherwise in the public interest. *In the Matter of the Commission's Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (Feb. 20, 2003).

Not surprisingly, the Commission is reluctant to find that it has issued an order that is likely to be reversed. In this case, for example, the Commission stated that the parties seeking a stay of the order authorizing the SSR had failed to provide a showing "that there is a reasonable possibility that the Supreme Court of Ohio will reverse or remand the ESP Order. The Commission, therefore, finds that the [parties seeking the stay] have not demonstrated that they are likely to prevail on the merits." Entry at 6 (Oct. 1, 2014). Without providing any details, the Commission then further found that none of the other requirements for a stay was satisfied either. *Id.* The Commission

then defended its authorization of the SSR in the appeal brought by IEU-Ohio and OCC seeking reversal of the authorization. Under these circumstances, seeking a stay to protect customer interests is essentially a futile act: the Commission will not admit that the order it has just issued and is defending in the Supreme Court should be stayed because it was likely wrong.

Alternatively, the Commission may adopt a procedural posture to deny a stay. In this case, for example, it refused to grant a motion to stay the SSR because IEU-Ohio and OCC had initiated an appeal of the Opinion and Order a month after they filed their motion and the "proper venue" for a request for a stay then rested with the Court. *Id.* In denying a stay because an appeal has been filed, however, the Commission ignores that the stay from the Court is nearly impossible for a customer to secure.

Under R.C. 4903.16, an appellant may seek a stay from the Supreme Court of a challenged rate during the pendency of an appeal if it can satisfy a security requirement. Due to the magnitude of the monetary claims associated with cases involving electric utilities, however, the security requirement is beyond the means of all parties except the utilities themselves. See *State ex rel. Industrial Energy Users-Ohio, v. Pub. Utils. Comm'n of Ohio*, 135 Ohio St.3d 367 (2013) (Pfeiffer, J., dissenting).

Based on Commission practice and the bonding requirements of Ohio law, a rule that prevents prospective relief from an unlawful order leaves customers unprotected and is unworkable. Customers are required to pay unlawfully high rates with no expectation that they will recover the excessive amounts or a means of cutting off the charges while they challenge the unlawful rates. A less fair or workable outcome would be difficult to conceive.

4. No party would suffer undue hardship if the Commission initiates a proceeding to prospectively adjust the rates of the Dayton Power and Light Company to account for amounts unlawfully billed and collected under the unlawful SSR from January 1, 2014

No legitimate reliance interest is jeopardized if the Commission initiates a proceeding to prospectively adjust the rates of DP&L to account for the amounts unlawfully billed and collected under the unlawful SSR.

Customers, on the one hand, have been burdened by the unlawful charge for nearly three years, all the while complaining that the authorization of the SSR plainly violated the bar on the collection of transition revenue or its equivalent. They are entitled and have a reasonable expectation to meaningful relief now that their claims have been endorsed by the Court.

On the other hand, DP&L had no reasonable expectation that it could bill the unlawful SSR revenue. As presented to the Commission, the SSR that DP&L proposed was to provide DP&L with above-market revenue in violation of the statutory prohibition on the authorization of transition revenue or its equivalent after the Market Development Period. That prohibition, R.C. 4928.38, has been in effect since 1999. DP&L could not have any legitimate expectation that it could retain the revenue it collected in violation of that prohibition.

Further, the Court has ordered prospective rate relief at least since the 1993 *Columbus Southern* case.

Moreover, the requirement to adjust rates prospectively to account for amounts charged under rates subsequently determined to be unjust or unreasonable would not be new, even to the Ohio utilities. Under federal law, utilities or their affiliates are subject to refund requirements. See Federal Power Act §§ 206 and 309.

Under these circumstances, there is no individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

5. The failure to provide an effective remedy when the Commission imposes illegal charges violates the Ohio Constitution

Under section 16 of Article I of the Ohio Constitution, "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have a remedy in due course of law, and shall have justice administered without denial or delay."

The failure to prospectively adjust rates to account for the effects of an unlawful authorization operates to deny customers a remedy for the injury done to them. Under the illegal rates, customers are first required to pay unjust and unreasonable charges while they wait for a final order from which they can seek review by the Supreme Court. If they survive the long delays imposed by the Commission and successfully prosecute an appeal, they are then afforded no relief for the injury incurred. This result violates the constitutional requirement that every person have a remedy in due course of law.

6. To the extent the Commission or the Supreme Court determines that *Keco* and the cases following it do not authorize the Commission to initiate a proceeding and prospectively order that rates be adjusted to account for the amounts billed and collected under the unlawful SSR, the Commission or the Court should overrule the cases extending *Keco*

In summary, the Commission should overrule those decisions extending *Keco* if the Commission is relying on them to deny customers relief in this case.

Initially, the Commission decisions extending *Keco* to preclude a Commission proceeding to address prospectively the rates of a utility were wrongly decided. Specifically, *Keco* did not address the jurisdiction of the Commission to prospectively adjust rates to account for effects of a Commission order that has been reversed by the Court; rather, the decision held that an equitable remedy could not be pursued in a court of general jurisdiction. At the same time, the Court has recognized that the Commission can provide prospective relief, and the Commission has on occasion applied that authority.

Further, the Commission's error in extending *Keco* into a limitation on its own authority does not conform to the statutory requirements of Title 49 of the Ohio Revised Code. Both R.C. 4905.22 and 4928.02 require that the Commission ensure that rates are just and reasonable. Extension of *Keco* to deny prospective customer relief after the Court has held that a Commission order is unlawful has the effect of affording a "windfall" based on an unlawful order. Assuring a windfall to the party whose claim has been found to be unlawful is the antithesis of a just and reasonable result.

Second, the Commission's application of *Keco* defies practical workability and inflicts serious financial injury on the innocent party. Although parties have thirty days to seek rehearing and the Commission has thirty days to rule on those applications, in practice the Commission with the Court's endorsement has granted rehearing for further review and then taken no action on the grant of rehearing for extended periods, sometimes years. While the review process slowly moves forward, securing a stay of the unlawful order from either the Commission or the Court is a practical impossibility. During this delay, customers are often required to pay illegally excessive rates to secure

vital electric services. When those same customers successfully secure an order from the Court reversing the Commission's unlawful decision to increase their rates, the Commission's extension of *Keco* to deny prospective relief permits the losing party to reap the rewards of an unlawful Commission order. A less workable or fair result is difficult to conceive, but it is the outcome produced by the Commission's review process and the extension of *Keco* to deny prospective relief from the effects of an order subsequently determined to be unlawful.

Third, abandoning the *Keco*-based precedents would not create an undue hardship for those who have relied upon it. Ohio customers would see an improvement in their lot as they are seldom the beneficiaries of the existing regulatory scheme. Moreover, providing rate relief to customers for the effects of an unlawful rate authorization would not be new, even to the Ohio utilities. Prior Court decisions and federal law already provide for such relief. Under these circumstances, therefore, there is no legitimate individual or societal reliance that prevents the Commission from initiating the requested proceeding to prospectively adjust DP&L's rates to account for the amounts unlawfully billed and collected under the SSR.

Further, reversal of the cases extending *Keco* would prevent violations of due process by providing a remedy for the injury inflicted by an unlawful Commission order.

In summary, the cases extending *Keco* that DP&L is relying upon to argue that the Commission should not initiate a proceeding to account for the amounts billed and collected under the unlawful rider and to prospectively reduce DP&L's rates to account for the identified amount should be overruled. Because the cases are wrongly decided, unworkable in practice, and harmful in result, the Commission (or the Court) should

"right that which is clearly wrong." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d at 232 (Moyer, C.J., concurring).

VI. CONCLUSION

For the reasons stated above, the Commission should grant rehearing, reverse its order dismissing this case, and initiate a proceeding to prospectively adjust DP&L's rates to account for the effects of the SSR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 26th day of September 2016, *via* electronic transmission.

/s/ Frank P.Darr
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CERTIFICATE OF FILING

I hereby certify that, in accordance with S.Ct.Prac.R. 3.11(B)(2), the *Notice of Appeal of Appellant Industrial Energy Users-Ohio* has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio, in accordance with Ohio Adm. Code 4901-1-02 and 4901-1-36, on the 13th day of February 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Appellant Industrial Energy Users-Ohio* was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to S.Ct.Prac.R. 3.11(B)(2) and R.C. 4903.13 on the 13th day of February 2017, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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