IN THE SUPREME COURT OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	17-0204 PUCO Case No. 17-_____
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code Section 4905.13.	)	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of its Amended Corporate Separation Plan.	)	PUCO Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

NOTICE OF APPEAL
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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(B)(2), 3.11(D)(2), and 10.02, gives notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal taken to protect customers from being made to pay millions of dollars ($73 million per year) to Dayton Power & Light Company ("DP&L") for unlawful transition charges.

The appeal is taken from PUCO decisions pertaining to the electric security plan of DP&L, Case No. 08-1094-EL-SSO et al. The decisions being appealed are the PUCO's Finding and Order entered in its Journal on August 26, 2016 (Attachment A), and the PUCO's Third Entry on Rehearing of December 14, 2016 (Attachments B).[1] This appeal addresses the PUCO's approval of another unlawful retail stability charge for DP&L.

Appellant is the statutory representative, as established under R.C. Chapter 4911, of DP&L's 456,282 residential customers. OCC was a party of record in the case being appealed.

On September 26, 2016, OCC filed an Application for Rehearing from the PUCO's August 26, 2016 Finding and Order, in accordance with R.C. 4903.10. By Entry dated October 12, 2016, the PUCO granted rehearing for further consideration of the matters specified in numerous parties' applications for rehearing. The PUCO issued its Third Entry on Rehearing on December 14, 2016. In that Entry, it denied all parties' applications for rehearing, including Appellant's, rendering a final, appealable order.

Appellant files this Notice of Appeal complaining of errors in the PUCO's August 26, 2016 Finding and Order, and the Third Entry on Rehearing of December 14, 2016. OCC

[1] Per S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

alleges that these Orders are unlawful and unreasonable in the following respects, all of which were raised in OCC's Application for Rehearing:

1. The PUCO unlawfully and unreasonably permitted DP&L to implement a retail stability charge that violated the Ohio Supreme Court's order in *In re: Application of Dayton Power & Light Co.*[2] The PUCO's decision was unlawful under R.C. 4903.13 because it did not fulfill the Court's mandate to the PUCO.

2. The PUCO unlawfully and unreasonably allowed DP&L to charge customers another retail stability charge when re-implementing DP&L's prior (2012) electric security plan rates, in response to this Court's decision on DP&L's prior electric security plan.[3] DP&L's retail stability charge to all customers collects unlawful transition revenues or any equivalent revenues from customers, violating R.C. 4928.38.

3. The PUCO unreasonably precluded parties from re-litigating the reasonableness and lawfulness of DP&L's retail stability charge to customers by applying the doctrines of res judicata and collateral estoppel to its 2012 decision. The PUCO's decision was unreasonable because the PUCO should have considered the changed circumstances since its 2012 decision. The changed circumstances included two Ohio Supreme Court decisions in 2016[4] striking down similar retail stability charges to customers.

4. The PUCO unreasonably and unlawfully approved DP&L's $73 million (per year) retail stability charge to customers as a provider of last resort ("POLR") charge. The PUCO's

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[2] 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179.

[3] *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179.

[4] *In re: Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62.N.E.3d 179; *In re: Application of Columbus Southern Power Co.*, 2016-Ohio-1608.

decision was unreasonable because DP&L is not providing POLR service to its customers while it is collecting the POLR charge. The PUCO's decision was unlawful because it lacked evidentiary support, violating R.C. 4903.09.

OCC respectfully submits that the PUCO's August 26, 2016 Opinion and Order and its Third Entry on Rehearing are unreasonable and unlawful, and should be reversed or modified with specific instructions to the PUCO to correct its errors.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal by the Office of the Ohio Consumers' Counsel, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record via electronic transmission this 13th day of February 2017.

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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.

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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. 08-1094-EL-SSO
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF REVISED TARIFFS.	CASE NO. 08-1095-EL-ATA
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF CERTAIN ACCOUNTING AUTHORITY.	CASE NO. 08-1096-EL-AAM
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR WAIVER OF CERTAIN COMMISSION RULES.	CASE NO. 08-1097-EL-UNC

FINDING AND ORDER

Entered in the Journal on August 26, 2016

I. SUMMARY

{¶ 1} The Commission grants The Dayton Power and Light Company's motion to implement the provisions, terms, and conditions of its first electric security plan until a subsequent standard service offer is authorized by the Commission.

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} On September 2, 2003, in Case No. 02-2779-EL-ATA, et al., the Commission issued an Opinion and Order (Order) approving a stipulation establishing a rate stabilization period and authorizing DP&L to implement a rate stabilization surcharge (RSS). The RSS allowed DP&L to recover costs associated with fuel price increases or actions taken in compliance with environmental and tax laws, regulations or court or administrative orders, and costs associated with physical security and cyber security relating to the generation of electricity from plants owned by DP&L and its affiliates. *In re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA, et al., Opinion and Order (Sept. 2, 2003).

{¶ 5} Thereafter, on December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved RSS into two separate components: (1) a rate stabilization charge (RSC) and (2) an environmental investment rider (EIR). The RSC was authorized to pay DP&L for costs associated with its provider of last resort (POLR) obligations, while the EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units. The Commission determined the RSC and EIR were both fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). The Supreme Court of Ohio subsequently affirmed the Commission's decision and upheld both the RSC and the EIR. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276.

{¶ 6} By Order issued on June 24, 2009, in this case, the Commission approved a stipulation and recommendation establishing 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). The RSC, EIR, and a fuel and purchased power rider (fuel rider) were included in *ESP I*.

{¶ 7} Thereafter, by Order issued on September 4, 2013, in Case No. 12-426-EL-SSO, the Commission approved DP&L's proposal for a second ESP (*ESP II*) with certain modifications. 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).

{¶ 8} However, on June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving *ESP II*. *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 the *ESP II Case* requiring the Commission to modify its order or issue a new order.

{¶ 9} On July 27, 2016, DP&L filed a motion and memorandum in support in the *ESP II Case* to withdraw its application for *ESP II*. Pursuant to R.C. 4928.143(C)(2)(a), "[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." Contemporaneous with this Order, the Commission grants DP&L's motion to withdraw *ESP II*, thereby terminating it.

{¶ 10} Pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." Accordingly, on July 27, 2016, DP&L filed a motion in this proceeding to implement *ESP I* pursuant to R.C.

4928.143(C)(2)(b). Thereafter, on August 1, 2016, DP&L filed proposed tariffs to implement *ESP I*.

{¶ 11} Memoranda contra to DP&L's motion to implement *ESP I* were filed in this case by the Ohio Manufacturers' Association (OMA), the Kroger Company (Kroger), the Ohio Consumers' Counsel (OCC), Industrial Energy Users - Ohio (IEU-Ohio), Ohio Energy Group (OEG), and the Retail Energy Supply Association (RESA). By Entry issued on August 3, 2016, the Commission requested comments from parties regarding DP&L's proposed tariffs. Comments on DP&L's proposed tariffs were filed by Ohio Partners for Affordable Energy (OPAE), Honda of America Manufacturing, Inc. (Honda), the City of Dayton (Dayton City), OCC, IEU-Ohio, Interstate Gas Supply, Inc. (IGS), RESA, Kroger, and OMA. On August 18, 2016, DP&L filed a reply to the memoranda contra and comments regarding DP&L's motion and proposed tariffs to implement *ESP I*. We note that some parties combined arguments regarding DP&L's motion to withdraw *ESP II* with arguments regarding DP&L's motion and proposed tariffs to implement *ESP I*. In this case, the Commission is only considering DP&L's motion to implement *ESP I* and the proposed tariffs. As we noted above, the Commission granted DP&L's motion to withdraw *ESP II*, thereby terminating it, in the *ESP II Case*.

III. ARGUMENTS OF THE PARTIES

{¶ 12} Pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized." DP&L argues in its motion to implement *ESP I* that the Commission must issue an order authorizing it to implement *ESP I*, pursuant to R.C. 4928.143(C)(2)(b) until the Commission approves a subsequent SSO.

{¶ 13} OPAE, Honda, Dayton City, OCC, IEU-Ohio, IGS, RESA, Kroger, and OMA assert that the Supreme Court of Ohio's decision reversing the Commission's decision in *ESP II* should result in a rate decrease, whereas DP&L's proposed tariffs would increase rates to customers. Further, the parties aver that DP&L's proposed tariffs to implement *ESP I* should be moot because the Commission should require DP&L to continue *ESP II* without the SSR. They argue that DP&L's request to implement *ESP I* with the RSC is an attempt to circumvent the Supreme Court of Ohio's decision reversing the SSR.

{¶ 14} Honda, Dayton City, IEU-Ohio, OCC, and Kroger then argue that if the Commission authorizes DP&L to implement *ESP I*, the RSC should not be included because it expired by its own terms and should be terminated. They note that when *ESP I* was originally authorized, DP&L was providing service as a provider of last resort and the RSC was a POLR charge. However, they argue this justification for the RSC is no longer applicable because POLR service is now provided by competitive bidding process auction participants. Since DP&L no longer bears the risk of providing POLR service, they argue that it should not be permitted to collect the RSC. Further, the parties assert that the RSC would unlawfully authorize DP&L to collect transition revenues or equivalent revenues, much like the SSR that was reversed by the Supreme Court of Ohio. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---. However, in its reply, DP&L argues the RSC should be implemented as a provision, term, or condition of *ESP I* for three reasons: (1) R.C. 4928.143(C)(2)(b) requires the Commission to continue the provisions, terms, and conditions of *ESP I*, (2) no party sought rehearing of the Commission's Order in the *ESP I Case* so they are barred from re-litigating the RSC due to the doctrines of res judicata and collateral estoppel, and (3) the RSC is a permissible charge authorized by the Commission pursuant to R.C. 4928.143(B)(2)(d).

{¶ 15} Similarly, OCC argues the Commission should not authorize DP&L to collect the EIR. OCC notes the EIR was authorized in *ESP I* to compensate DP&L for investments in its generation units to address United States Environmental Protection Agency (US

EPA) regulations. OCC asserts that DP&L is already collecting the EIR through base generation rates. Therefore, OCC avers that implementing the EIR would authorize DP&L to charge customers twice for the same service. Further, OCC asserts the EIR would unlawfully authorize DP&L to collect transition revenues or equivalent revenues, much like the RSC or the SSR that was reversed by the Supreme Court of Ohio. *In re Application of Dayton Power & Light Co.*, ---Ohio St.3d---, 2016-Ohio-3490, ---N.E.3d---.

{¶ 16} IEU-Ohio, OMA, and Kroger argue that if the Commission authorizes DP&L to implement *ESP I*, then the Commission should require DP&L to implement the provisions, terms, and conditions of *ESP I* as they were originally authorized. The parties argue that R.C. 4928.143(C)(2)(b) requires DP&L to implement *ESP I* exactly as it was. To do this, IEU-Ohio initially asserts the Commission should direct DP&L to delete its transmission cost recovery rider-bypassable (TCRR-B) and transmission cost recovery rider-nonbypassable (TCRR-N) tariff sheets to implement just the bypassable transmission cost recovery rider authorized in *ESP I*. IEU-Ohio then argues the Commission should direct DP&L to remove its request for shared savings from its application in Case No. 16-329-EL-RDR to update and reduce its energy efficiency rider rates. Further, IEU-Ohio asserts the Commission should direct DP&L to delete the storm cost recovery rider tariff sheet and the reconciliation rider tariff sheet. However, IGS, RESA, and OCC support maintaining some provisions of *ESP II* and support maintaining the integrity of the current market structure, including maintaining competitively bid generation rates and the TCRR-N.

{¶ 17} In its reply, DP&L argues that its proposed tariffs to maintain certain aspects of *ESP II* and market structure will minimize customer and market impacts. DP&L asserts that the parties ignore the following key points: (1) competitive bidding has occurred in DP&L's service territory, and parties have already entered into binding contracts in reliance upon that process, (2) several riders in *ESP I* were not impacted by *ESP II*, and (3) DP&L's rates would actually be significantly higher if new rates were implemented exactly

as they were in *ESP I* in 2013. When DP&L filed its proposed tariffs, it noted that it would honor existing contracts with winning competitive bid suppliers through the end of their term in May 2017 and maintain current PJM obligations for all suppliers. Therefore, DP&L intends for its tariffs to reflect the competitive bid rate in order to minimize rate impacts to customers.

{¶ 18} Finally, Honda and Dayton City request clarification concerning DP&L's calculation of fuel costs under the fuel rider and the continuation of the competitive bidding process. Honda and Dayton City also request the Commission establish a procedural schedule in this matter.

IV. COMMISSION CONCLUSION

{¶ 19} The Commission notes that on December 28, 2005, in Case No. 05-276-EL-AIR, the Commission adopted a stipulation authorizing DP&L to split its previously approved RSS into two separate components: the RSC and the EIR. The RSC was authorized to pay DP&L for costs associated with its POLR obligations, while the EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units. The Commission determined both the RSC and EIR were fair, reasonable, and supported by the record. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005). Thereafter, the Supreme Court of Ohio affirmed our decision. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276. By Order issued on June 24, 2009, in this case, the Commission approved a stipulation establishing *ESP I* and continuing the RSC and EIR as terms of *ESP I*. *ESP I Case*, Opinion and Order (June 24, 2009). Further, along with the RSC and EIR, the Commission authorized a fuel and purchased power rider, a storm cost recovery rider, an energy efficiency rider, and a transmission cost recovery rider. No party appealed the Commission's decision approving *ESP I*.

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

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

{¶ 22} With respect to the EIR, the Commission notes the EIR is a bypassable rider, and thus, was part of the rate offered to non-shopping customers in *ESP I*. The EIR was authorized in *ESP I* to allow DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax expenses to install

environmental control devices on its generating units to comply with US EPA regulations. However, when the EIR was originally authorized, those generating units were being used to provide public utility service to non-shopping customers as part of the standard service offer. With the implementation of the competitive bidding process to procure retail electric generation from wholesale suppliers, those generating units and their associated environmental controls are not currently being used to provide public utility service to non-shopping customers under the standard service offer. Therefore, while the EIR is a provision, term, or condition of *ESP I*, the environmental controls for which the EIR recovered DP&L's investments are no longer used and useful in rendering public utility service to customers. Accordingly, similar to the fuel rider, the EIR should be approved as a provision, term, or condition of *ESP I*, but should be set to zero. We also note the SSO for non-shopping customers in *ESP I* included base generation rates, the EIR, and the fuel rider. Thus, the energy and capacity obtained by the competitive bidding process should replace the EIR, as well as base generation rates and the fuel rider. As proposed by DP&L, the costs of such energy and capacity will be recovered through the standard offer tariff.

{¶ 23} The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. We note there are no further competitive auctions scheduled to procure energy and capacity for non-shopping customers after May 31, 2017. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of *ESP I*. The Commission stated in its December 19, 2012, Entry in this case, "[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC.

As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized." *ESP I Case*, Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of *ESP I*. *ESP I Case*, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of *ESP I*; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel.

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

{¶ 25} However, the Commission understands that a number of mercantile customers could benefit by shopping for all transmission services. The Commission encourages such customers, and IEU-Ohio, to work with Staff to determine whether a

filing under R.C. 4905.31 could enable these customers to receive an exemption from the TCRR-N and to shop for transmission services.

{¶ 26} We also disagree with IEU-Ohio's claim that the Commission should direct DP&L to delete its storm cost recovery rider from DP&L's tariffs. The stipulation approved by the Commission in the *ESP I Case* specifically authorized DP&L to request a separate rider to recover the costs of storm damage. Therefore, the storm cost recovery rider is a provision, term or condition of *ESP I*, and DP&L should be permitted to continue its current storm cost recovery rider. *ESP I Case*, Opinion and Order (June 24, 2009) at 5-6.

{¶ 27} Likewise, the Commission disagrees with IEU-Ohio's argument that the Commission should direct DP&L to reduce the rates of the energy efficiency rider to the amounts recovered under *ESP I* and to remove its request for shared savings from DP&L's application in Case No. 16-329-EL-RDR. R.C. 4928.143(C)(2)(b) does not require the Commission to reestablish the "rates" of the previous SSO; the statute requires the Commission to continue the "provisions, terms, and conditions" of the previous SSO. Further, we note the stipulation in the *ESP I Case* specifically allows DP&L to implement an energy efficiency rider to recover costs related to programs implemented to achieve compliance with the statutory energy efficiency and peak demand reduction standards. *ESP I Case*, Opinion and Order (Sept. 4, 2013) at 5. Moreover, we find that the issue of whether DP&L should receive shared savings is better resolved in Case No. 16-329-EL-RDR.

{¶ 28} In conclusion, the Commission finds that DP&L's motion to implement *ESP I* should be granted. Therefore, within seven days, DP&L shall file final tariffs, consistent with this Finding and Order, subject to review by the Commission. Finally, the Commission finds that no hearing is necessary in this matter.

V. ORDER

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That DP&L's motion to implement previously authorized rates be granted. It is, further,

{¶ 31} ORDERED, That, within seven days, DP&L file, in final form, two complete copies of its tariff, consistent with this Finding and Order. One copy shall be filed in this case docket and one copy in its TRF docket. It is, further,

{¶ 32} ORDERED, That the effective date of the new tariff shall be a date not earlier than the date of this Finding and Order, and the date upon which the final tariffs are filed with the Commission. It is, further,

{¶ 33} ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

{¶ 34} ORDERED, That DP&L notify all customers regarding the availability of the new tariffs via a bill message, via a bill insert, or via a separate mailing within 30 days of the effective date of the tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

{¶ 35} ORDERED, That a copy of this Finding and Order be served upon each party of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

GAP/BAM/sc/vrm

Entered in the Journal
AUG 26 2010

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. 08-1094-EL-SSO
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF REVISED TARIFFS.	CASE NO. 08-1095-EL-ATA
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR APPROVAL OF CERTAIN ACCOUNTING AUTHORITY.	CASE NO. 08-1096-EL-AAM
IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND LIGHT COMPANY FOR WAIVER OF CERTAIN COMMISSION RULES.	CASE NO. 08-1097-EL-UNC

THIRD ENTRY ON REHEARING

Entered in the Journal on December 14, 2016

I. SUMMARY

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

II. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

III. DISCUSSION

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

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

{¶ 12} Additionally, pursuant to R.C. 4928.143(C)(2)(b), "[i]f the utility terminates an application * * * or if the commission disapproves an application * * *, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively." Accordingly, on July 27, 2016, DP&L filed a motion in this proceeding to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b), and then filed proposed tariffs. Therefore, in this case, the Commission is only considering rehearing on its decision to implement *ESP I* pursuant to R.C. 4928.143(C)(2)(b). Assignments of error related to DP&L's withdrawal of *ESP II* and the Commission's granting of DP&L's withdrawal, thus terminating *ESP II*, are not relevant to this case and should have been raised in the *ESP II Case*. Likewise, assignments of error related to the service stability rider (SSR) are not relevant to this proceeding. The SSR was authorized in *ESP II* and all issues regarding the SSR should be raised in that proceeding.

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

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

A. Assignment of Error 1

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

{¶ 16} DP&L argues the parties ignore several key points: 1) competitive bidding has occurred in DP&L's service territory, and parties have entered into contracts in reliance upon that process; 2) several riders are not impacted by *ESP II* (e.g., Universal Service Rider, Energy Efficiency Rider, Alternative Energy Rider); and 3) DP&L's rates would actually be significantly higher if new rates were implemented exactly how they existed in 2013. Therefore, DP&L argues, granting rehearing on this assignment of error would not be in the public interest. DP&L asserts the Commission should reject this assignment of error. According to DP&L, granting rehearing on this assignment of error would disrupt the competitive market and related contracts, and result in rates that are significantly higher than those proposed by DP&L.

CONCLUSION

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

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

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

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

B. Assignment of Error 2

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

{¶ 21} DP&L argues the parties ignore that existing competitive retail electric service (CRES) supply contracts, existing SSO auction-winning bids, and related Master SSO Supply Agreements are all premised upon the TCRR-N/TCRR-B structure that was put in place in *ESP II*. These contracts and winning bids assume that transmission costs will be incurred and recovered by DP&L through the TCRR-N. DP&L asserts that if the Commission were to eliminate the TCRR-N, ample lead time would be required to prepare and adjust existing and new contracts.

CONCLUSION

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

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

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

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

C. *Assignment of Error 3*

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

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

currently providing the POLR function, it should not be permitted to collect costs that are intended to compensate it for providing that function.

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

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

{¶ 29} DP&L then argues that the parties' arguments are barred by R.C. 4903.10(B) and the doctrines of res judicata and collateral estoppel. DP&L notes that no party in this case sought rehearing of the Commission decision approving the Stipulation, and no party appealed the decision. It is well settled, and expressly provided in R.C. 4903.10(B), that a party cannot challenge a decision if it did not seek rehearing of that decision. Further, the intervenors arguments are also barred by the doctrines of collateral estoppel (issue preclusion) and res judicata (claim preclusion). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶6 (2007). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ." *O'Nesti* at ¶7. "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first

action, or be forever barred from asserting it." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). Further, "the doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982). DP&L asserts that collateral estoppel applies to arguments that could have been brought in an earlier action. In this case, R.C. 4928.39 was in effect at the time *ESP I* was filed and litigated, and parties could have raised their arguments at the time but did not. DP&L asserts that since no party challenged the Commission's decision in *ESP I*, the intervenors are barred by the doctrines of res judicata and collateral estoppel from challenging the lawfulness of the RSC.

{¶ 30} OMA and Kroger assert that the doctrines of res judicata and collateral estoppel do not apply here. They argue that where "there has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of res judicata nor the doctrine of collateral estoppel will bar litigation of that issue in a later action." *State ex. rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 45, 529 N.E.2d 1255 (1988). Similarly, OCC argues the Commission's Order is unjust or unreasonable because the Commission held that parties were precluded from re-litigating the RSC due to the doctrines of res judicata and collateral estoppel.

CONCLUSION

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

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

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

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

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

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

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

D. Assignment of Error 4

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

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

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

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

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

IV. ORDER

{¶ 39} It is, therefore,

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

BAM/sc

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DEC 14 2016

Barcy F. McNeal

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Secretary