BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTION TO STAY PROCEEDINGS PENDING A RULING FROM THE SUPREME COURT OF OHIO BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION AND SUMMARY

Unable to file yet another application for rehearing, The Office of the Ohio Consumers' Counsel ("OCC") seeks reconsideration of the Commission's August 26, 2016 Finding and Order by other means. Specifically, it now asks the Commission to prohibit The Dayton Power and Light Company ("DP&L") from collecting the Rate Stabilization Charge ("RSC") while appeals from this proceeding remain pending. E.g., Feb. 13, 2017 Notice of Appeal by The Office of the Ohio Consumers' Counsel. The Motion should be denied for three separate and independent reasons.

First, the Commission lost jurisdiction to modify its Finding and Order when OCC and other parties filed their appeals. The Supreme Court of Ohio has exclusive jurisdiction to "reverse[], vacate[], or modif[y]" final orders of the Commission, and the Court repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). No statute or rule allows the Commission to modify its orders while they are on appeal; therefore, the Commission lacks jurisdiction to grant the relief requested by OCC.

Second, the Commission has no authority to stay its final orders. Office of Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 403, 575 N.E.2d 157 (1991). Instead, R.C. 4903.16 provides the exclusive mechanism for granting such stays. Id. Pursuant to that statute, only the Supreme Court may issue a stay upon an "undertaking, payable to the state . . . conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of . . . in the event such order is sustained." R.C.

4903.16. The Commission should not allow OCC to circumvent those statutory requirements. In addition, if the Commission were to grant a stay, then it would violate R.C. 4903.15, which further provides that "[u]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission." (Emphasis added.)

Third, even if the Commission had jurisdiction to modify the Finding and Order and authority to stay it, OCC has not shown that such relief is necessary. In particular, OCC has failed to demonstrate a strong likelihood of success on the merits of its pending appeal. The Commission already has rejected OCC's arguments against the RSC, and OCC fails to mention R.C. 4928.143(C)(2), the statute under which the Commission authorized the RSC. Aug. 26, 2016 Finding and Order, ¶20, 23. Moreover, DP&L and its customers would be irreparably harmed if the $73 million per year RSC were stayed given the adverse impact on DP&L's financial integrity and its ability to provide safe and reliable service. May 5, 2017 DP&L's Initial Post-Hearing Brief, pp. 6-12 (Case No. 16-395-EL-SSO) (collecting testimony showing the current risk to DP&L's financial integrity and, thus, its ability to provide safe and reliable service). OCC dismisses that significant public harm and suggests (p. 13) – without any evidence – that amounts collected under the previously-authorized Service Stability Rider would "certainly offset" any harm caused by a stay. The Commission should disregard such baseless assertions.[1]

[1] Although the Motion asks (p. 1) the Commission to "stay this proceeding," OCC exclusively argues for a stay of the RSC and no other provision, term or condition authorized in the Aug. 26, 2016 Finding and Order. Thus, this Memorandum responds to OCC's arguments relating to the RSC. To the extent that the Commission construes the Motion as requesting a stay of the entire proceeding or the entire Finding and Order, the Motion should be denied for lack of any supporting argument by OCC and for the reasons stated in Sections II and III of this Memorandum.

II. THE COMMISSION LACKS JURISDICTION TO MODIFY ITS FINDING AND ORDER ALLOWING DP&L TO IMPLEMENT THE RSC

The Commission cannot stay the RSC because it lost jurisdiction to modify the Finding and Order authorizing that charge when OCC and other parties filed appeals from this proceeding. Ohio S. Ct. Case No. 2017-204. The Supreme Court of Ohio repeatedly has held that "absent specific statutory authority or rule, official boards or administrative agencies have jurisdiction to reconsider decisions only until the actual institution of a court appeal therefrom or until expiration of the time for appeal." State ex rel. Borsuk v. City of Cleveland, 28 Ohio St.2d 224, 227, 277 N.E.2d 419 (1972) (emphasis added; emphasis in original omitted). Accord: Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div., 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph three of the syllabus; State ex rel. Gatlin v. Yellow Freight Sys., Inc., 18 Ohio St.3d 246, 249, 480 N.E.2d 487 (1985); Todd v. Gen. Motors Corp.,65 Ohio St.2d 18, 19, 417 N.E.2d 1017 (1981). That holding is consistent with the Ohio rule that "[w]hen a case has been appealed, the trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." Howard v. Catholic Social Servs., 70 Ohio St.3d 141, 146, 637 N.E.2d 890 (1994) (per curiam) (emphasis added).

The General Assembly has adopted a comprehensive framework for reviewing final orders of the Commission, including applications for rehearing and direct appeals to the Supreme Court. R.C. 4903.10 through 4903.13. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." In re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. Accord: Penn Cent. Transp. Co. v. Pub. Util. Comm., 35 Ohio St.2d 97, 298 N.E.2d 587 (1973), paragraph one of the syllabus (holding that the Commission "is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute"); Ohio Bus Line,

Inc. v. Pub. Util. Comm., 29 Ohio St.2d 222, 226, 280 N.E.2d 907 (1972) (holding that the Commission "has only such jurisdiction and authority to act as is vested in it by statute").

No statute or rule allows the Commission to reconsider its final orders once they are appealed to the Supreme Court. Such reconsideration would be directly inconsistent with the Court's exclusive jurisdiction to "reverse[], vacate[], or modif[y]" the Commission's orders. R.C. 4903.13. Accord: Howard, 70 Ohio St.3d at 146. As the General Assembly has not authorized the Commission to reconsider its final orders while they are on appeal, the Commission lacks jurisdiction to modify the RSC while that charge is under review by the Supreme Court. Accord: Ohio Constitution, Article IV, Section 2(B)(2)(d) (providing that "the supreme court shall have . . . [s]uch revisory jurisdiction of the proceedings of administrative officers and agencies as may be conferred by law") (emphasis added). The Commission should deny a stay this reason alone.

III. THE COMMISSION SEPARATELY LACKS AUTHORITY TO STAY ITS OWN FINAL ORDERS

Even if the Commission could have retained jurisdiction to modify the Finding and Order (it cannot), R.C. 4903.16 provides the exclusive mechanism for staying a final order of the Commission. OCC should not be permitted to avoid that statute's requirements.

This issue was settled by the Supreme Court in Office of Consumers' Counsel v. Pub. Util. Comm., 61 Ohio St.3d 396, 575 N.E.2d 157 (1991). In that case, OCC asked the Commission to stay an order directing the collection of new rates and later appealed from the denial of that request. Id. at 403. The Court affirmed the denial of the stay, explaining:

> "OCC sought to stay the implementation of the amendment of the rates resulting from the Commission's prior order to delete the condominium clause from Ohio Edison's tariff. However, it did not follow the statutory procedure of asking the Supreme Court to

> stay an order of the Commission, including posting a bond. See R.C. 4903.16. Instead, OCC moved the Commission itself to stay consideration of the amendment application. The Commission denied that motion, and OCC appealed to this court . . . .
>
> That was a *final* Commission order. If appellant wished to stay the collection of rates authorized by that order pending its appeal thereof, it should have moved to stay the order. Additionally, in that R.C. 4903.16 is the statute dealing with staying a final Commission order, appellant should have complied with all of its requirements. Appellant did not apply to this court for a stay of the final order . . . nor did it post a bond. Therefore, based upon R.C. 4903.16, and this court's interpretation thereof, appellant would not be entitled to the relief it seeks . . . ."

Id. (emphasis in italics in original; emphasis underlined added). Accord: Columbus v. Pub. Util. Comm., 170 Ohio St. 105, 109, 163 N.E.2d 167 (1959) ("any stay of an order of the commission is dependent on the execution of an undertaking by the appellant"); In the Matter of the Application of Duke energy Ohio, Inc. for an Increase in Gas Rates, et al., Case Nos. 12-1685-GA-AIR, et al., Entry, p. 6 (Dec. 2, 2013) ("it would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay").

Staying the Finding and Order would be inconsistent with the requirements established by the General Assembly that such stays must be (1) issued by the Supreme Court and (2) subject to an undertaking by the appellant. "Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation." In re Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 19. Indeed, the legislature "has seen fit to establish a significant requirement to the court's stay power: the posting of a bond sufficient to protect the utility against damage." Id. at ¶ 20. Moreover, the Court expressly has held that this requirement "clearly applies" to OCC. Id. at ¶ 20 ("Whether it is wise to apply the bond requirement to OCC is a matter for the General Assembly to consider, not this court."). Thus, the Commission should not accept OCC's invitation to upend or avoid

that statutory framework. Doing so would also be contrary to R.C. 4903.15, which provides that "[u]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission." (Emphasis added.). OCC's Motion should be denied for this separate reason as well.

IV. OCC HAS NOT DEMONSTRATED THE NECESSITY OF A STAY

Even if the Commission were to decide that it has both jurisdiction to modify the Finding and Order and authority to stay its implementation, OCC has failed to show why a stay is necessary. In its Motion, OCC concedes (p. 4) that to obtain a stay, it must demonstrate (1) "a strong showing of the likelihood of prevailing on the merits," (2) that "without a stay irreparable harm will be suffered," (3) "whether or not, if the stay is issued, substantial harm to other parties would result," and (4) "where lies the interest of the public." MCI Telecommunications Corp. v. Pub. Util. Comm., 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). As shown below, OCC cannot satisfy that high burden.

A. OCC Cannot Show a Strong Likelihood of Prevailing on the Merits

The Commission already has allowed DP&L to implement the RSC and has affirmed that decision on rehearing. Aug. 26, 2016 Finding and Order; Dec. 14, 2016 Third Entry on Rehearing. Specifically, the Commission held,

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

> with any expected increases or decreases in fuel costs, pursuant to R.C. 4928.143(C)(2)(b), until a subsequent SSO is authorized.
>
> * * *
>
> The RSC is a nonbypassable POLR charge to allow DP&L to fulfill its POLR obligations. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. We note there are no further competitive auctions scheduled to procure energy and capacity for non-shopping customers after May 31, 2017. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. Further, we have already determined the RSC is a valid provision, term, or condition of *ESP I.* The Commission stated in its December 19, 2012, Entry in this case, '[t]he Commission finds that the provisions, terms, and conditions of the ESP include the RSC. As one of the provisions, terms, or conditions of the current ESP, the RSC should continue with the ESP until a subsequent standard service offer is authorized.' *ESP I Case,* Entry (Dec. 19, 2012). On February 19, 2013, the Commission issued an Entry on Rehearing upholding its determination that the RSC is a provision, term, or condition of *ESP I. ESP I Case*, Entry on Rehearing (Feb. 19, 2013). No party appealed this ruling by the Commission. Accordingly, the Commission has already determined the RSC is a provision, term, or condition of *ESP I*; therefore, we find the parties' arguments both lack merit and are barred by the doctrines of res judicata and collateral estoppel."

Aug. 26, 2016 Finding and Order, ¶¶ 20, 23 (alteration in original) (emphasis added). Accord: Dec. 14, 2016 Third Entry on Rehearing, ¶¶ 31-35. For these reasons and those set forth below, OCC cannot show a strong likelihood of success on its current appeal from the Commission's decision. In the Matter of the Application of Duke energy Ohio, Inc. for an Increase in Gas Rates, et al., Case Nos. 12-1685-GA-AIR, et al., Entry, p. 6 (Dec. 2, 2013) (holding that "it

would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay").

1. Following the Termination of DP&L's Most Recent ESP, the Commission Was Required to Implement the Rates Approved in This Proceeding on a Temporary Basis

Upon the withdrawal and termination of DP&L's most recent ESP after the Commission's decision in Case No. 12-426-EL-SSO was reversed by the Supreme Court,[2] the Commission correctly authorized DP&L to implement the provisions, terms, and conditions of DP&L's most recent SSO, i.e., the ESP approved in this proceeding (including the RSC), until a new SSO is approved. Aug. 26, 2016 Finding and Order, ¶¶20, 23. Indeed, the Commission was required to do so by statute.

Specifically, pursuant to R.C. 4928.143(C)(2),

> "(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.
>
> (b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer . . . until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively."

R.C. 4928.143(C)(2) (emphasis added).

The terms of R.C. 4928.143(C)(2)(b) are clear – the Commission must implement "the provisions, terms, and conditions of the utility's most recent standard service offer." There

[2] In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016)

is no dispute that this proceeding established DP&L's most recent SSO. Nor is there any dispute that the RSC was a term of that SSO. R.C. 4928.143(C)(2)(b) thus establishes that the Commission's order authorizing the RSC is lawful.

In addition, pursuant to R.C. 4928.141(A): "Only a standard service offer authorized in accordance with R.C. 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section." Similarly, R.C. 4905.32 states: "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time." Since the Supreme Court reversed the Commission's decision in Case No. 12-426-EL-SSO in its entirety, these statutes required the Commission to implement DP&L's immediately-prior SSO, i.e., the ESP approved in this proceeding, including the RSC. The authorization of the RSC is, therefore, lawful.

2. OCC Did Not Seek Rehearing of the Commission's Decision in This Case Approving the RSC

The Commission correctly concluded in the Finding and Order (¶ 23) that OCC and other intervenors were barred by the doctrines of res judicata and collateral estoppel from challenging the RSC. Specifically, on February 24, 2009, DP&L filed a Stipulation and Recommendation recommending the RSC. The Stipulation was signed by OCC,[3] and approved by the Commission. June 24, 2009 Opinion and Order, p. 13.

[3] Feb. 24, 2009 Stipulation and Recommendation, pp. 21-22.

No party to this proceeding sought rehearing of the Commission decision approving the Stipulation, and no party appealed from that decision. It is well settled in Ohio that a party cannot challenge a Commission decision if it did not seek rehearing of that decision. R.C. 4903.10(B) ("No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.").

In addition, OCC is barred from challenging the lawfulness of RSC by the doctrine of res judicata and collateral estoppel. "The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." O'Nesti v. DeBartolo Realty Corp., 113 Ohio St. 3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter." Id. (internal citation omitted). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ." Id. at ¶ 7 (internal citation omitted). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Grava v. Parkman Twp., 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995) (internal quotation marks and citation omitted). Accord: Natl. Amusements, Inc. v. City of Springdale, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990) ("It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have

been litigated in a first lawsuit.") (internal quotation marks, citation and emphasis omitted). "[T]he doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." Johnson's Island, Inc. v. Bd. of Twp. Trustees, 69 Ohio St. 2d 241, 246, 431 N.E.2d 672 (1982).

The Commission has held that the principles of res judicata and collateral estoppel apply to its proceedings. Aug. 24, 2005 Entry, pp. 3-4 (Case No. 05-886-EL-CSS) ("The Ohio Supreme Court has confirmed that 'where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.'") (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980), syllabus); Feb. 13, 2014 Opinion and Order, p. 36 (Case No. 12-2400-EL-UNC) ("There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation in a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral estoppel applies to administrative proceedings before the Commission."); Dec. 2, 2015 Entry, p. 3 (Case No. 15-796-TR-CVF) ("The Commission finds that Quality Carriers is precluded from raising the same issues in this proceeding that were previously decided in Quality Carriers 1 under the doctrines of res judicata and collateral estoppel.").

OCC's argument (pp. 6-9) that there is no longer an identity of issues that would preclude it from relitigating the RSC lacks merit. As shown above, the Commission was required to implement rates consistent with those approved in this proceeding after the termination of DP&L's ESP in Case No. 12-426-EL-SSO. R.C. 4928.143(C)(2)(b) ("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 . . . until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code") (emphasis added). Since the Commission had to authorize previously-authorized rates, any change in circumstances is irrelevant. Since no party challenged the Commission's decision authorizing the RSC in this proceeding, the Commission correctly held that OCC and other intervenors are barred by res judicata and collateral estoppel from belatedly challenging its lawfulness.

3. The RSC is Not a Transition Charge

OCC's erroneous contention that the RSC is a transition charge (pp. 5-6) fails to address significant issues raised by DP&L in this proceeding. First, the Commission already has found that the RSC was not a transition charge under R.C. 4928.38 and 4928.141(A). Dec. 19, 2012 Entry, p. 4 (Case No. 12-426-EL-SSO). Second, although OCC relies on In re Application of Columbus S. Power Co., Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608 (Sup. Ct. Ohio Apr. 21, 2016) and In re Application of Dayton Power and Light Co., Case No. 2014-1505, Slip Op. No. 2016-Ohio-3490, ¶ 1 (Sup. Ct. Ohio June 20, 2016), in neither case did the Supreme Court consider whether (1) the "[n]otwithstanding" clause of R.C. 4928.143(B) negates the applicability of R.C. 4928.38 and 4928.143(A), or (2) as the later-enacted statute, R.C. 4928.143(B)(2)(d) cannot be not limited by R.C. 4928.38. Those points establish that a stability charge authorized under R.C.4928.143(B)(2)(d) is not an unlawful transition charge.

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

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

> "(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section,

> divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> * * *
>
> (2) The plan may provide for or include, without limitation, any of the following:
>
> * * *
>
> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]"

(Emphasis added.)

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

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

In the AEP case cited by OCC, the majority of the Supreme Court declined to consider whether the "[n]otwithstanding" clause saved AEP-Ohio's stability charge because "no party appears to have raised the issue." In re Application of Columbus S. Power Co., 2016-Ohio-1608, at ¶ 38 n.3. Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the Commission to interpret the "notwithstanding" clause. Id. at ¶ 71-79. The Commission may thus consider the "notwithstanding" clause issue in this proceeding, and should conclude that the clause establishes that a stability charge authorized by R.C. 4928.143(B)(2)(d) is not barred by the transition cost provisions.

b. R.C. 4928.143(B)(2)(D) Is the Later-Enacted Statute

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

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

4. DP&L Continues to Bear POLR Risk

OCC finally argues (pp. 9-10) that the RSC is a POLR charge, and that DP&L is no longer subject to provider of last resort ("POLR") risk. However, the Commission has already correctly held that "DP&L maintains a long-term obligation to serve as a provider of last

resort." Aug. 26, 2016 Finding and Order, ¶ 23. The Commission's holding on that issue was plainly correct. R.C. 4928.141.

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

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

(Emphasis added.)

DP&L thus continues to bear a POLR risk, and OCC's arguments that DP&L no longer bears such risk are incorrect. Accord: Aug. 26, 2016 Finding and Order, ¶23 ("Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as a provider of last

resort, even while POLR services are being provided by competitive bidding auction participants in the short-term.").

B. DP&L and Its Customers Would Suffer Irreparable Harm if the Commission Were to Stay Collection of the RSC

Aside from its failure to show a strong likelihood of success on the merits of its appeal, OCC fails to show that it will suffer irreparable harm absent a stay. On the contrary, DP&L and its customers will suffer significant irreparable harm if the Commission were to modify its Finding and Order and stay collection of the $73 million per year RSC. Such a stay would jeopardize both DP&L's financial integrity and its ability provide safe and stable service.

At the recent evidentiary hearing its pending ESP case (Case No. 16-395-EL-SSO), DP&L witness Craig Jackson testified that an inability by DP&L to maintain its financial integrity "would have a deleterious effect on the utility's . . . ability to provide stable and certain utility service to customers." Jackson Test. (DP&L Ex. 1B), pp. 17-18 (emphasis added).

A recently-issued report by Standard & Poor's, which was introduced at that hearing, reflects the current risk to DP&L's financial integrity. While the report assumes that the Commission will adopt the March 13, 2017 Stipulation and Recommendation filed in the ESP case, it nevertheless contains the following credit ratings:

> "• We are lowering our issuer credit ratings on both parent DPL and utility subsidiary DP&L to 'BB-' from 'BB'. The outlook is negative.
>
> • We are lowering our rating on DPL's senior unsecured debt to 'B+' from 'BB' and revising the recovery rating on this debt to '5' from '4' based on deteriorating value of the merchant power assets and the structural subordination of this debt.

- At the same time, we are affirming our 'BBB-' rating on DP&L's senior secured debt. We revised the recovery rating on this debt to '1+' from '1', reflecting our assessment of modestly improved recovery prospects for the utility secured debt.

- In addition, we are revising our stand-alone credit profile assessment for DP&L to 'bbb' from 'bbb+'."

DP&L Ex. 105 (Case No. 16-395-EL-SSO). (emphasis added). The BB- and B+ ratings are not investment grade; the BBB- rating is the lowest investment grade rating; the bbb rating is the second-lowest investment grade rating. Trans. Vol. IV, pp. 698-70 (OCC witness Kahal).

No OCC witness disputed that the financial integrity of DP&L is currently at risk. Trans. Vol. III, p. 634 (admission by OCC witness Haugh that he did no analysis of DP&L's financial integrity or its ability to provide safe and reliable service); Trans. Vol. IV, pp. 769-70 (admissions by OCC witness Williams that he does not contest that DP&L's financial integrity is at risk, and that DP&L needs sufficient funds to provide safe and reliable service); Trans. Vol. V, pp. 839, 843 (admissions by OCC witness Parcell that customers benefit if their utility is financially healthy). OCC witness Kahal further conceded that it is "vitally important" that DP&L have an investment grade credit rating. Trans. Vol. IV, pp. 695-97.

In this proceeding, however, OCC asks the Commission to stop DP&L from collecting the $73 million per year RSC without showing that DP&L could maintain its financial integrity or continue providing safe and reliable service without it. As shown above, the proposed stay would cause substantial harm to DP&L and its customers, which would be contrary to the public interest.

V. CONCLUSION

The Commission lacks jurisdiction to modify the August 26, 2016 Finding and Order, separately lacks authority to stay that order, and OCC has failed to demonstrate the necessity of a stay in this proceeding. For the foregoing reasons and those stated in the Aug. 26, 2016 Finding and Order and Dec. 14, 2016 Third Entry on Rehearing, the Commission should deny OCC's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Stay Proceedings Pending a Ruling from the Supreme Court of Ohio by The Office of the Ohio Consumers' Counsel has been served via electronic mail or U.S. Regular Mail upon the following counsel of record, this 11th day of May, 2017:

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Case No(s). 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC

Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to the Motion to Stay Proceedings Pending a Ruling From the Supreme Court of Ohio by The Office of the Ohio Consumers' Counsel electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company