

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

ENTRY

Entered in the Journal on June 14, 2017

I. SUMMARY

{¶ 1} The Commission denies the motion to stay filed by Ohio Consumers' Counsel.

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* was a rate stabilization charge (RSC). 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 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 a 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*. The Commission found the tariffs should be approved as it relates to honoring existing contracts with winning competitive bid suppliers and maintaining current obligations for all suppliers.

{¶ 7} Thereafter, numerous parties, including the Ohio Consumers' Counsel (OCC), filed applications for rehearing of the Commission's Entry implementing *ESP I*. By Entry on Rehearing on December 14, 2016, the Commission denied all of the applications for rehearing.

{¶ 8} On February 13, 2017, OCC, and other parties, filed notice that it had appealed the Commission's decision to the Supreme Court of Ohio.

{¶ 9} On April 26, 2017, OCC filed a motion to stay proceedings pending a ruling from the Supreme Court of Ohio. DP&L filed a memorandum contra OCC's motion on May 11, 2017, and OCC filed its reply on May 18, 2017.

III. DISCUSSION

{¶ 10} In its motion, OCC requests that DP&L be prevented from recovering the RSC that is a part of *ESP I* until the Supreme Court rules on OCC's appeal. When the Supreme Court reversed the Commission's approval of *ESP II*, OCC asserts that the Supreme Court reversed the Commission's approval of *ESP II* because DP&L's service stability rider was found to be an unlawful transition charge. According to OCC, the RSC is no different than the stability rider that the Supreme Court previously found to be unlawful and OCC correspondingly expects to prevail on its appeal. Because state law prevents customers from getting refunded what they were improperly charged, OCC seeks a stay of the collection of the RSC until the appeal is resolved.

{¶ 11} OCC notes that in considering motions to stay the Commission has favored the four-factor test outlined in *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604 (1987). The four factors are:

- (a) Whether there is a strong showing that movant is likely to prevail on the merits;

- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Where the public interest lies; and
- (d) Whether the stay would cause substantial harm to other parties.

{¶ 12} OCC argues that it will prevail on appeal for three reasons. First, because of similarities between DP&L's stability rider in *ESP II* and the RSC in *ESP I*, OCC avers the Supreme Court is likely to find the charges in *ESP I* are similarly unlawful. OCC further reasons that it will win its appeal because the Commission unreasonably reinstated *ESP I* without allowing parties to re-litigate the RSC. OCC states the RSC was originally approved by the Commission in 2009 in order to compensate DP&L for being a provider of last resort (POLR), which, at that time, was a lawful charge. According to OCC, DP&L no longer has POLR obligations and thus the RSC is fundamentally different from when it was originally approved. Therefore, OCC submits the RSC should not have been reinstated without first giving parties the opportunity to litigate its current reasonableness. Relatedly, because the RSC was originally approved due to DP&L's POLR obligations and because DP&L now no longer has POLR obligations, OCC states the Supreme Court is likely to side with OCC that the RSC was unlawfully and unreasonably reinstated by the Commission.

{¶ 13} OCC further argues that a stay is warranted because DP&L's customers are being irreparably harmed by the unlawful collection of the RSC. OCC avers that even if OCC wins its appeal, the money collected by DP&L prior to a decision cannot be refunded to the customers. Thus, because the customers can never recover those lost funds, OCC contends they will be irreparably harmed if a stay is not granted. While DP&L's customers are likely to be harmed if a stay is not granted, OCC maintains that DP&L will likely be free from harm. First, OCC states any potential harm is offset by the \$285 million that DP&L already over-collected from the unlawful stability rider in *ESP II*. Additionally, OCC states

it should already be expected by DP&L that the Supreme Court would find the RSC to be improper. Consequently, because a stay would prevent irreparable financial harm to DP&L's entire customer base, without causing substantial harm to DP&L, OCC claims that a stay furthers the public interest. Accordingly, OCC avers it satisfies all four parts of the test and that a stay precluding DP&L from recovering the RSC is necessary and warranted.

{¶ 14} For multiple reasons, DP&L argues the motion to stay should be denied. The Company first argues that the Commission no longer has jurisdiction to modify *ESP I* and the RSC. According to DP&L, once OCC and other parties filed an appeal of the Commission's Entry with the Supreme Court, the Commission's ability to modify its orders ended (citing *State ex re. Borsuck v. City of Cleveland*, 28 Ohio St.2d 225, 277 N.E.2d 419 (1972)). DP&L states that unless there is specific statutory authority saying otherwise, an administrative agency such as the Commission only has the capability to modify its decisions up until a court appeal is instigated. Here, DP&L notes there is no such statutory authority, and, therefore, OCC's motion should be denied.

{¶ 15} DP&L further avers the stay should be denied because the Commission does not have authority to stay its own final orders. DP&L notes that R.C. 4903.16 delineates the requirements for obtaining a stay of execution of final Commission orders. According to the Company, R.C. 4903.16 requires that any stay must be issued by the Supreme Court and must be subject to an undertaking by the appellant. Citing Supreme Court precedent, DP&L affirms that a party must follow this statutory procedure in order to obtain a stay (*Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991)). By incorrectly seeking a stay via the Commission and by failing to post a bond, DP&L maintains OCC failed to adhere to the provisions of the statute. Thus, the Company avers OCC's request is improper and requests that it be denied.

{¶ 16} Lastly, DP&L submits that OCC's motion fails on the merits as it does not pass the four part test, described above, from *MCI Telecommunications v. Pub. Util. Comm.*, 31 Ohio St.3d 604 (1987). Regarding the potential success of OCC's appeal to the Supreme Court,

DP&L naturally disagrees with OCC and contends the appeal is not likely to prevail. DP&L asserts that when the Company withdrew and terminated *ESP II*, R.C. 4928.143(C)(2)(b) required the Commission to implement the most recent standard service offer, which, here, was *ESP I* and the RSC. DP&L further maintains that when *ESP I* was originally approved in 2009, OCC was a signatory party to the stipulation and did not apply for rehearing or file an appeal, and, therefore, the doctrines of res judicata and collateral estoppel bar OCC from belatedly challenging the RSC. Besides the procedural arguments, the Company additionally avers the RSC is a lawful charge that the Supreme Court will uphold. While OCC contends the RSC is an unlawful transition charge, DP&L counters that the RSC is instead a lawful stability charge under R.C. 4928.143(B). DP&L also disputes OCC's assertion that the Company no longer has POLR obligations. DP&L affirms that, because there is an ongoing risk that winning auction bidders could default, DP&L continues to bear POLR risks and has a long-term obligation to do so. For these reasons, the Company asserts OCC's appeal lacks merit and is likely to be denied.

{¶ 17} DP&L also refutes OCC's argument that customers will suffer irreparable harm if a stay is not granted. Instead, DP&L asserts that both DP&L and its customers will be harmed if a stay is granted. The Company states the financial integrity of DP&L is currently at risk, and the RSC is necessary in order for the utility to continue to provide safe and reliable service. For these reasons, DP&L argues it is in the public interest to deny OCC's motion to stay.

{¶ 18} In response, OCC contends that the Commission does have jurisdiction and the authority to grant a stay. OCC states that the Commission has previously granted stays until cases were decided by other judicial bodies such as the Supreme Court or the Federal Energy Regulatory Commission (citing, respectively, *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, Entry (July 18, 2002) and *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, Case No. 02-1586, et al., Entry (Feb. 20, 2003)). Additionally,

OCC maintains that the Commission has broad authority under Title 49 of the Revised Code to use its discretion power to protect customers. According to OCC, this includes the ability to issue stays in order to safeguard the public interest.

IV. CONCLUSION

{¶ 19} OCC's motion should be denied. Once an appeal of a final Commission order is filed with the Supreme Court, the Commission no longer has the authority to grant a motion to stay. As discussed in *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991), parties seeking a stay of a final Commission order must comply with R.C. 4903.16. The statute reads, in pertinent part: "A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court * * * allows such stay, in which event the appellant shall execute an undertaking* * *." As stated, with an appeal pending, only the Supreme Court has the ability to grant a stay of execution and, further, the movant must also post a bond. This is in line with Commission precedent, as we have previously found that once an appeal is submitted to the Court for its consideration, "it is not within the Commission's power to grant a stay" and that "the only avenue for consideration of such a request for stay would be before the court itself" (*In re the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with Automated Meter Reading and for Certain Accounting Treatment*, Case No. 07-829-GA-AIR, et al., Entry at 6 (July 29, 2009)). In that case, similar to the facts in this proceeding, an appeal of a final Commission order was pending before the Supreme Court when the motion to stay was filed. The cases cited by OCC are not applicable to this case because, in the cases cited by OCC, the Commission had not issued a final appealable order, and no appeals were currently pending before the Supreme Court. Here, OCC has exhausted its available recourses with the Commission, the Commission has issued a final order, OCC has petitioned for relief with the Supreme Court, and this proceeding is now under the Supreme Court's review. As such, we no longer have the authority to grant a stay and any party

seeking a stay must comply with the specific requirements of R.C. 4903.16. Consequently, the Commission denies OCC's motion to stay.

V. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That OCC's motion to stay be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Asim Z. Haque, Chairman

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