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Via E-File

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Public Utilities Commission of Ohio
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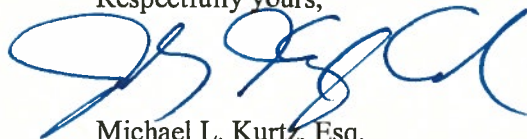
**In re: Case Nos. 08-1094-EL-SSO, 08-1095-EL-ATA, 08-1096-EL-AAM, 08-1097-EL-UNC,
16-0395-EL-SSO, 16-0396-EL-ATA and 16-0397-EL-AAM**

Dear Sir/Madam:

Please find attached the COMMENTS OF THE OHIO ENERGY GROUP (OEG) e-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,



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MLKkew

Encl.

Cc:

Certificate of Service
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**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
	:	
In The Matter Of The Application Of Dayton Power And Light Company For Approval of its Electric Security Plan.	:	Case No. 16-0395-EL-SSO
	:	
In The Matter Of The Application Of The Dayton Power And Light Company For Approval of Revised Tariffs.	:	Case No. 16-0396-EL-ATA
	:	
In The Matter Of The Application Of Dayton Power And Light Company For Approval Of Certain Accounting Authority Pursuant to Ohio Rev. Code §4905.13.	:	Case No. 16-0397-EL-AAM
	:	

COMMENTS OF THE OHIO ENERGY GROUP

The Ohio Energy Group (“OEG”) hereby submits its Comments in response to the Public Utilities Commission of Ohio’s (“Commission”) November 27, 2019 in the above-captioned proceeding. As discussed in greater detail herein, the Commission should reject The Dayton Power and Light Company’s (“DP&L” or “Company”) proposed tariffs filed on November 26, 2019 in this proceeding because DP&L has no statutory right under R.C. 4928.143(C)(2)(a) to withdraw its current Electric Security Plan (“ESP”) under the particular circumstances of this case.

I. DP&L Cannot Withdraw Its Current ESP Pursuant To R.C. 4928.143(C)(2)(a).

While R.C. 4928.143(C)(2)(a) grants electric distribution utilities a statutory right to withdraw an ESP application (and thereby terminate the ESP) if the Commission modifies and approves that application, that statutory right does not apply when: 1) the impacted ESP is the product of a final, appealable Commission order; and 2) a subsequent Commission modification is required solely in order to enforce a finding by the Supreme Court of Ohio.

R.C. 4928.143(C)(2)(a) provides:

*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.¹*

DP&L would have the Commission interpret this provision in a way that would extend a utility's right of withdrawal indefinitely, allowing utilities that are years into an ESP to simply withdraw that ESP in response to any slight modification and to revert to an entirely different rate structure, without a hearing and regardless of the potential rate shock to customers. The Commission should reject such an unreasonable interpretation. The most reasonable construction of R.C. 4928.143(C)(2)(a) is that a utility's statutory right of withdrawal applies only in cases where a *proposed* ESP application is modified by the Commission (whether through an initial order or a rehearing entry) as a result of the Commission's own volition – not when an ESP that is already subject to a final, appealable Commission order is subsequently modified solely due to a Court mandate.

DP&L's current ESP (approved in Case No. 16-395-EL-SSO *et al*) is not merely a *proposed* standard service offer. That ESP results from a final, appealable Commission order and has been in effect since November 1, 2017. Customers have come to rely on the current ESP rate structure and to use that structure to inform planning and budgeting decisions. Moreover, the Commission did not *voluntarily* modify DP&L's current ESP to remove the Distribution Modernization Rider ("DMR"). The only modification required – immediate cessation of the DMR – was entirely the result of the Court's decision and therefore involuntary on the part of the Commission. Accordingly, given that DP&L's request to withdraw its current ESP strays far from the situation contemplated by

¹ Emphasis added.

the plain language R.C. 4928.143(C)(2)(a), that statute is not a basis upon which to approve withdrawal of its current ESP.

A utility's statutory right to withdraw an ESP does not extend indefinitely. That right does not apply when the utility accepts a Commission-modified ESP by allowing that ESP to go into effect and then the Commission's final order is later modified by the Court. The law gives the utility a limited "veto" right over Commission modifications of a proposed application; it does not give the utility a "veto" right over decisions of the Court.

Allowing the Company to withdraw its current ESP in light of the Court's finding with respect to DMR charges undermines the statutory appellate process provided for under R.C. 4903.13. The utility's statutory right to withdraw a proposed ESP must be read in concert with the other parties' statutory right to appeal a final Commission order and to receive the full relief ultimately provided by the Court. *"All statutes relating to the same general subject matter must be read in pari material, and in construing these statutes in pari material, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes."*² The best way to harmonize those two statutes is to bar a utility from invoking R.C. 4928.143(C)(2)(a) after the date upon which the Commission issues a final, appealable order on the utility's proposed ESP and the utility has accepted the Commission's modifications by allowing the ESP to go into effect.

Approving DP&L's requests would render the appellate process ineffective and again put this Commission on a collision course with the Court. In 2015, the Court stated that *"[i]f the commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application."*³ But the Court has never stated that a utility is entitled to thwart the Court's appellate mandate by withdrawing its ESP after receiving an unfavorable decision from the Court. While this issue was recently raised at the Court in an appeal of DP&L's previous ESP, the Court ultimately found the issue moot in light of the Commission's approval of DP&L's current ESP.⁴ Thus, with respect to the proper interpretation of R.C.

² *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995, 998 (1995) (citing *United Tel. Co. v. Limbach* (1994), 71 Ohio St.3d 369, 372, 643 N.E.2d 1129, 1131).

³ *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056 at ¶26 (emphasis added).

⁴ *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009.

4928.143(C)(2)(a), the Commission is not bound by any definitive Court precedent and can adopt an interpretation that preserves the appellate process as an effective mechanism by which to combat unlawful charges.

II. DP&L Should Follow The FirstEnergy Precedent.

In response to the Court's June 19, 2019 finding that FirstEnergy's DMR was unlawful and a directive that the Commission remove the DMR from FirstEnergy's current ESP,⁵ the Commission issued orders modifying that ESP as directed.⁶ FirstEnergy did not then withdraw its entire ESP, but instead retained rate stability for customers by continuing its current plan with the added benefit of the DMR removal. Nor did the Commission give any indication that its Court-mandated modification triggered R.C. 4928.143(C)(2)(a).

DP&L should adopt the same approach here. The Company's current ESP was the result of a carefully-negotiated and complex Stipulation among a diverse array of parties, and the majority of the provisions in that settlement need not and should not be disturbed.⁷ Indeed, the Stipulation itself provides that if the Commission materially modifies the approved settlement pursuant to a Supreme Court reversal, then all signatory parties, *including DP&L*, must attempt to negotiate a resolution that maintains the intent of the settlement. Specifically, the Stipulation states:

If the Commission does not adopt the Stipulation without material modification upon rehearing, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, then within thirty (30) days of the Commission's Entry on Rehearing or Order on Remand: (a) any Signatory Party may withdraw from the Stipulation by filing a notice with the Commission ("Notice of Withdrawal"); or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice ("Utility Notice"). Upon the filing of such Utility Notice by DP&L, the Stipulation shall immediately become null and void. No Signatory Party shall file a Notice of Withdrawal or Utility Notice without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation.⁸

⁵ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

⁶ Order on Remand, Case No. 14-1297-EL-SSO (August 22, 2019); Finding and Order, Case No. 14-1297-EL-SSO (September 26, 2019).

⁷ Amended Stipulation and Recommendation, Case No. 16-395-EL-SSO (March 14, 2017)("Stipulation").

⁸ Stipulation at 38.

It would therefore be unreasonable to allow DP&L to subvert its Stipulation obligation and to unduly harm retail customers by simply replacing one substantial charge (the DMR) with another (the Rate Stabilization Charge) through the invocation of an inapplicable ESP withdrawal statute.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "m. l. kurtz", is written over a horizontal line.

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December 4, 2019

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Summary: Comments Ohio Energy Group (OEG) Comments electronically filed by Mr.
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