

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. 16-0395-EL-SSO
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
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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. 16-0397-EL-AAM
	:	

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO
JOINT MOTION TO STRIKE DP&L'S NOTICE OF WITHDRAWAL**

I. INTRODUCTION AND SUMMARY

The City of Dayton and Ohio Partners for Affordable Energy (collectively "Joint Movants") argue that the Commission should strike DP&L's Notice of Withdrawal in this case. They assert that DP&L waived its statutory right under R.C. 4928.143(C)(2)(a) to withdraw its Application pursuant to paragraph XI.5 of the Amended Stipulation and Recommendation ("Stipulation").

The principal defect in their argument is that they can point to no language in which DP&L waived its statutory rights under R.C. 4928.143(C)(2)(a) to terminate its ESP Application. The Stipulation granted to DP&L additional rights to terminate the Stipulation, but did not waive DP&L's statutory right to terminate the ESP III Application.

II. DP&L DID NOT WAIVE ITS STATUTORY RIGHT TO WITHDRAW

After the Commission issued its Supplemental Opinion & Order, DP&L had the right to withdraw and terminate its Application. R.C. 4928.143(C)(2)(a); In re Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 27-30 (Commission issued order that modified prior Commission order that had approved an ESP; Court held that second order triggered utility's right to withdraw under R.C. 4928.143(C)(2)(a)).

The Joint Movants do not dispute in their motion that DP&L has a statutory right to withdraw its Application. Instead, they assert that DP&L waived that right in Section XI.5 of the Stipulation. The defect in the Joint Movants' argument is that there is no language in that paragraph stating that DP&L waived its statutory right to withdraw and terminate its application.

Indeed, R.C. 4928.143(C)(2)(a) and paragraph XI.5 of the Stipulation each grant different rights to DP&L. R.C. 4928.143(C)(2)(a) grants to DP&L the right to terminate an ESP application, and thus terminate the entire case; that right can be exercised immediately after a Commission Order. In contrast, paragraph XI.5 grants to DP&L the right to terminate the Stipulation; there are restrictions as to when and how that right can be exercised. Those two rights thus allow DP&L to make a strategic decision as to whether it is better for it after a Commission Order modifies a Stipulation to terminate the Stipulation and continue to litigate that case, or to revert back to its prior ESP and file a brand new ESP. Those two rights exist independently, and DP&L has never waived either.

The Joint Movants cite to Sanitary Commercial Servs., Inc. v. Shank, 57 Ohio St.3d 178, 566 N.E.2d 1215 (1991) for the proposition that a party can waive a statutory right. The problem with that argument is that the party in that case had signed a document in which it

expressly "waived . . . his right to contest" the other party's action. Id. at 179 (internal quotations omitted). Here, DP&L has not signed a waiver of its rights.

The Joint Movants also rely upon State ex. Rel. Board of County Commissioners of Athens County v. Board of Directors of the Gallia Jackson Meeks Vinton Joint Solid Waste Management District, 75 Ohio St.3d 611, 665 N.E.2d 202 (1996). Again, in that case, the party had signed an agreement in which it "waived any claim" (id. at 617), something that DP&L has not done.

In short, DP&L has not waived its statutory right under R.C.4928.143(C)(2)(a) to withdraw and terminate its ESP III Application, and the Commission should deny the Joint Motion.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Memorandum in Opposition to Joint Motion to Strike DP&L's Notice of Withdrawal has been served via electronic mail upon the following counsel of record, this 10th day of December, 2019:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to Joint Motion to Strike DP&L's Notice of Withdrawal electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company