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 Section 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

JOINT APPLICATION FOR REHEARING
OF
THE OHIO MANUFACTURERS' ASSOCIATION
AND
THE KROGER COMPANY

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association (OMA) and The Kroger Company (Kroger) (collectively, Joint Applicants) hereby respectfully request rehearing of the Public Utilities Commission of Ohio's (Commission) December 18, 2019 Second Finding and Order (December 2019 Order) issued in the above-captioned matter. The Joint Applicants contend that the December 2019 Order is unlawful, unjust, and unreasonable in the following respects:

> Assignment of Error 1: The Commission Erred by Implementing an Unjust and Unreasonable Blended ESP in Contradiction to R.C. 4928.143(C)(2)(b).

Assignment of Error 2: The Commission Erred in Approving an Unjust, Unreasonable, and Unlawful Stability Charge.

Assignment of Error 3: The Commission Erred in Holding that Parties Are Barred from Challenging the Stability Charge.

For these reasons, and as further explained in the Memorandum in Support attached hereto, the Joint Applicants respectfully request that the Commission grant this Application for Rehearing.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Counsel of Record
Carpenter Lipps & Leland L.L.P.
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)
Counsel for the Ohio Manufacturers' Association

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Counsel of Record
Carpenter Lipps & Leland L.L.P.
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-9145
paul@carpenterlipps.com
(willing to accept service by e-mail)
Counsel for The Kroger Company

January 17, 2020

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 Section 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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Dayton Power and Light Company (DP&L) filed a "Notice of Withdrawal," stating that it is "exercis[ing] its statutory right to withdraw" its Application in Case No. 16-395-EL-SSO (ESP III) and to implement its ESP from Case No. 08-1094-EL-SSO (ESP I), including a rate stability charge (Rate Stabilization Charge (RSC) or Stability Charge), pursuant to R.C. 4928.143(C)(2)(b). The Ohio Manufacturers' Association (OMA) and The Kroger Company (Kroger) oppose the Commission's approval of the withdrawal of the ESP III Application in the related ESP III case and the implementation of a blended ESP in this proceeding.

On February 22, 2016, DP&L filed an application for a standard service offer pursuant to R.C. 4928.141.[1] DP&L's application was for an ESP in accordance with R.C. 4928.143. While the ESP included a placeholder rider for grid modernization, no specific grid modernization investments were authorized or required in the proceeding.

On March 14, 2017, several parties filed an Amended Stipulation and Recommendation, which included a Distribution Modernization Rider (DMR), in the ESP III proceeding.[2] The Commission modified and approved the Stipulation on October 20, 2017,[3] and further modified and approved the ESP III Stipulation on November 21, 2019 as explained below.[4] The Parties agreed that "as a package, the ESP III Stipulation benefits customers and the public interest" and "violates no regulatory principle or practice."[5] When Interstate Gas Supply (IGS) attempted to withdraw, DP&L argued that it could not do so because that would be a violation of the ESP III Stipulation.

After a Supreme Court of Ohio decision was issued in *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, reconsideration denied, 156 Ohio St.3d, 2019-Ohio-331, 129 N.E.3d 454, and reconsideration denied, 156 Ohio St.3d. 1487, 2019-Ohio3331, 129 N.E.3d 458 (*Ohio Edison*), the Commission issued an Entry on July 2, 2019, providing parties with the opportunity to file supplemental briefs regarding the impact of the Court's decision on DP&L's ESP III.

---

[1] *In re Dayton Power and Light Co.,* Case No. 16-395-EL-SSO, Application (ESP III Application).

[2] *In re Dayton Power and Light Co.,* Case No. 16-395-EL-SSO, Stipulation and Recommendation at §11.2 (March 14, 2017) (ESP III Stipulation).

[3] *In re Dayton Power and Light Co.,* Case No. 16-395-EL-SSO, Opinion and Order at ¶131 (October 20, 2017) (ESP III Order).

[4] *In re Dayton Power and Light Co.,* Case No. 16-395-EL-SSO, Supplemental Opinion and Order at ¶134 (November 21, 2019) (ESP III Supp. Order).

[5] ESP III Stipulation at 2.

On November 21, 2019, the Commission issued a Supplemental Opinion and Order that ordered DP&L to eliminate the DMR in light of the Supreme Court's decision in *Ohio Edison*.[6] In response, DP&L filed to withdraw its ESP and implement new tariffs from its purported most recent SSO (i.e., the Blended ESP authorized in this case on December 19, 2012, which included the RSC[7]), plus additional provisions from its ESP II and ESP III.

On December 18, 2019, the Commission issued a Second Opinion and Order (December 2019 Order) in this proceeding, authorizing DP&L to revert to what has been incorrectly referred to as DP&L's ESP I plan. Instead, as explained by the Commission,[8] in its August 26, 2016 Finding and Order in this case (August 2016 Order), which previously granted a withdrawal of ESP II and a reversion to a prior standard service offer, the Commission modified two provisions of DP&L's ESP I and allowed DP&L to implement a blended ESP, which contained provisions from ESP I and ESP II (hereafter, Blended ESP). The approval of that Blended ESP was not reviewed on its merits as the Supreme Court of Ohio deemed the case to be moot as the Commission had already implemented ESP III by the time the appeal could be heard.[9] In its December 2019 Order, the Commission again allowed DP&L to implement the Blended ESP, which unlawfully continued the expired Stability Charge.[10] The Commission, without explanation and justification to do so, also allowed DP&L to continue the nonbypassable transmission cost recovery rider approved in ESP II and ESP III,[11] and authorized recovery of storm costs

[6] ESP III Supp. Order at ¶¶1, 102-110, 134.

[7] *In re Dayton Power and Light Co.,* 08-1094-EL-SSO, et al., Entry at 3-5 (December 19, 2012).

[8] December 2019 Order at ¶28.

[9] *In re Dayton Power and Light Co.*, 154 Ohio St.3d 1434, 2018-Ohio-4732, 112 N.E.3d 920.

[10] December 2019 Order at ¶29.

[11] Id. at ¶39 (citing Order at 5-6 and Third Entry on Rehearing at ¶¶24, 26).

through the storm cost recovery rider approved in ESP II at levels approved in ESP III, but did not require the corresponding distribution rate freeze included in ESP I.[12]

In lieu of adopting the most recent standard service offer, the Commission's December 2019 Order unjustly and unreasonably implements a blended electric security plan (a combination of three distinct electric security plans) in violation of Ohio law, allowing DP&L to avoid the Commission's directive to reduce its monthly charges by eliminating its so-called DMR in light of the Supreme Court of Ohio's recent decision in *Ohio Edison* finding that such riders are unlawful.[13] The Commission should not allow DP&L to avoid Court precedent by creating a new scheme to reinstitute select portions of prior electric security plans. Doing so allows DP&L to resurrect an unlawful transition charge, the Stability Charge from ESP I, while retaining provisions of the withdrawn ESP II and ESP III.

Over the last two years, DP&L has collected approximately $218.75 million in subsidies from its customers through the DMR. Now, when the Supreme Court of Ohio has ruled that such riders are unlawful and the Commission has ordered that the DMR be eliminated, the Commission authorizes DP&L to withdraw from ESP III after reaping the benefits of the plan for two years and revert back to charges from ESP I and ESP II, including the Stability Charge, and retain favorable provisions and riders from ESP III. The Court, however, has repeatedly ruled that charges such as the Stability Charge are unlawful. Therefore, the Commission should modify its December 2019 Order and

[12] Id.

[13] 157 Ohio St.3d 73 (2019), reconsideration denied 156 Ohio St.3d 1487.

prohibit DP&L from collecting unlawful charges through a blended ESP I, ESP II, and ESP III, contrary to the statutory mandates.

II. ARGUMENT

A. Assignment of Error 1: The Commission Erred by Implementing an Unjust and Unreasonable Blended ESP in Contradiction to R.C. 4928.143(C)(2)(b).

Upon withdrawal, the statute does not authorize DP&L to revert to a Blended ESP, but that is exactly what the Commission authorized DP&L to do. The Commission approved tariffs beyond those necessary to "continue the provisions, terms, and conditions of the utility's most recent standard service offer"[14] and blended provisions from ESP I, ESP II, and ESP III. Blending provisions across multiple ESPs is not authorized by R.C. 4928.143(C)(2)(b). R.C. 4928.143(C)(2)(b) provides that if a utility terminates its ESP application, the "[C]ommission 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." By statute, the Commission is limited to authorizing a return to the utility's most recent standard service offer together with necessary fuel-cost adjustments. Where a statute is unambiguous, it must be enforced according to its terms.[15] Applying that interpretive principle, the Commission should conclude that its powers under R.C. 4928.143(C)(2)(b) were limited to authorizing DP&L to implement the provisions, terms, and conditions of its most recent standard service offer after a lawful withdrawal, not some blend of its ESP I, its ESP II, and now its ESP III. The Commission has previously acknowledged its limitations: "The Commission cannot

[14] R.C. 4928.143(C)(2)(b).

[15] *Sugarcreek Twp. v. Centerville*, 133 Ohio St.3d 467, 2012-Ohio-4649, 979 N.E.2d 261, ¶19.

arbitrarily choose some of the various provisions of the ESP to continue after the termination date of the ESP and choose other provision of the ESP not to continue."[16]

But when approving the reversion back to the prior standard service offer, the Commission, without explanation and justification to do so, continued the expired Stability Charge,[17] continued the nonbypassable transmission cost recovery rider approved in ESP II and ESP III,[18] and authorized recovery of storm costs through the storm cost recovery rider approved in ESP II at levels approved in ESP III, but did not require the corresponding distribution rate freeze agreed to in ESP I.[19] More specifically, after comprehensive negotiations resulting in a compromise of competing positions, several parties filed a settlement resolving the issues in ESP I on February 24, 2009.[20] The ESP I Stipulation was a compromised package of terms and conditions negotiated as a whole by the parties. And, as part of the entire settlement package, the parties negotiated and agreed to a Stability Charge that expired on December 31, 2012. The parties also agreed to a distribution rate freeze and only approved placeholders for DP&L to seek recovery of certain transmission and storm costs as conditions of the stipulated ESP I.

Accordingly, the Commission is required to eliminate the expired Stability Charge, eliminate the nonbypassable transmission recovery rider, collect only the amount for storm costs that were authorized under the prior standard service offer, and reinstate the distribution rate freeze requirement. By allowing DP&L to return to its ESP I while

---

[16] *In the Matter of the Application of the Application of Dayton Power & Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, Entry on Rehearing at ¶10 (February 19, 2013).

[17] December 2019 Order at ¶29.

[18] Id. at ¶39 (citing Order at 5-6 and Third Entry on Rehearing at ¶¶24, 26).

[19] Id.

[20] ESP I Case, Stipulation and Recommendation (February 24, 2009) (ESP I Stipulation).

removing certain provisions but retaining certain provisions approved under ESP II and ESP III, without justification, the Commission exceeded its powers conferred by R.C. 4928.143(C)(2)(b). The Commission's powers do not extend to blending certain provisions, terms, and conditions of DP&L's prior standard service offers and/or ESPs that are more favorable to DP&L. If some of the provisions decrease DP&L's revenue or are unenforceable, DP&L must go through the normal regulatory process to achieve a different result.

Blending provisions from prior standard service offers and/or ESPs also conflicts with the fundamental purpose of ESP applications under Ohio law. In the event an application is terminated, all of its provisions are also terminated. R.C. 4928.143(C)(2)(b) reflects this reality, giving the utility the limited right to "continue the provisions, terms, and conditions of its most recent standard service offer, along with any increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized." If one application gets withdrawn, then the Commission shall treat that application as if it never existed, and continue with the previous standard service offer. Noticeably absent from the statutory scheme is the ability to reinstate other provisions from other ESP applications, which is what the Commission authorized here. As a creature of statute, the Commission must follow the law.

Limiting the continued rate to the most recent standard service offer, and not allowing utilities to cherry-pick and blend provisions from multiple electric security plans, should make the utility think twice about withdrawing. Withdrawal of electric security plans creates rate uncertainty for customers and for the market as a whole. Because

blending provisions and reinstating provisions from multiple electric security plans violates both Ohio law and public policy, the Commission should modify its December 2019 Order.

B. Assignment of Error 2: The Commission Erred in Approving an Unjust, Unreasonable, and Unlawful Stability Charge.

The Supreme Court of Ohio has issued a series of decisions on the impropriety of financial stability charges. Specifically, in *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734 (*Columbus S. Power Co.*), the Court found that a similar Retail Stability Rider (AEP's stability charge) collected from customers the equivalent of transition revenue, in violation of R.C. 4928.38. *Id.* In its decision, the Court explained that AEP's Stability Charge was "intended to guarantee recovery of lost revenue resulting from certain discounted capacity prices offered to CRES providers and from expected increases in customer shopping during the ESP," and because electric utilities were not able to recover transition revenues, or the equivalent of transition revenues, AEP's Stability Charge was unlawful. *Columbus S. Power Co.* at ¶¶ 23, 25. Then, in *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179, the Court reversed the Commission's order approving the Service Stability Rider contained in DP&L's ESP II, on the authority of *Columbus S. Power Co.*

The Stability Charge represents transition revenue or its equivalent, as it is substantially identical to both the Service Stability Rider that the Supreme Court of Ohio struck down in *In re Application of Dayton Power & Light Co.,* AEP's Stability Charge that the Court struck down in *Columbus S. Power Co.*, and FirstEnergy's Distribution Modernization Rider struck down just recently in *Ohio Edison.*[21] DP&L's Stability Charge

[21] 157 Ohio St.3d 73 (2019), reconsideration denied, 2019-Ohio-3331, 156 Ohio St.3d 1487.

cannot be distinguished from those charges that were struck down by the Court in 2016 and 2019.

The Commission should also not rely on cases where the Court, in one instance, purportedly upheld a rate stabilization surcharge rider as lawful in a tariff filing case regarding the extension of a market development period and whether the stabilization surcharge should apply to all customers. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767 (*Constellation*). And in another case, where the Court upheld the stabilization surcharge as lawful when it determined whether the amount of the stabilization surcharge approved in the prior market development extension case was reasonable in a rate case proceeding. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 (*Ohio Consumers' Counsel*). These cases are clearly distinguishable.

Notably, these cases were not on appeal from approval of an ESP where the stabilization surcharge was established, and neither case dealt with the issue of whether the stabilization surcharge was an unlawful transition charge in violation of R.C. 4928.37 through 4928.40. In *Constellation*, the Court explained that the Commission's findings regarding the stabilization surcharge were whether the stabilization surcharge was properly applied to all customers. *Constellation* at ¶39. The issue of whether the stabilization surcharge was lawful or whether it unlawfully provided transition revenues was not on appeal. It could not have been. The stabilization surcharge was approved in a different case, not on appeal, and the market development period had not yet ended. Utilities were permitted to receive transition revenue through the end of the market development period

or longer if the transition revenue was associated with regulatory assets. See R.C. 4928.37 – 4928.40.

In *Ohio Consumers' Counsel*, the issues on appeal were the modification of a settlement without unanimous agreement of the signatory parties, the amount of the stabilization surcharge, whether the stabilization surcharge is a generation or distribution cost, and whether the settlement was in the public interest. *Ohio Consumers' Counsel* at ¶¶10, 13, 17, 26, 27, and 30. Importantly, the Court specifically recognized that the case did not involve a competitive service, agreed that generation costs and distribution costs must be separated, and that the stabilization surcharge is a generation cost that should be placed on the generation-service tariffs as a generation charge. *Ohio Consumers' Counsel* at ¶26. Again, the issue of whether the stabilization surcharge was lawful or whether it unlawfully provided transition revenues was not on appeal.

Neither *Constellation* nor *Ohio Consumers' Counsel* has any applicability to the current matter. This is confirmed by *Columbus S. Power Co.* In *Columbus S. Power Co.*, the Court carefully traced the history of transition revenues since 1999, recognizing that the receipt of transition revenues was limited:

> Utilities had until December 31, 2005 (the end of the market-development period, see R.C. 4928.01(A)(26)) to receive generation transition revenue. R.C. 4928.38 and 4928.40(A). *Utilities were also permitted to receive transition revenue associated with regulatory assets* (i.e., deferred charges, see R.C. 4928.01(A)(26)) *until December 31, 2010*. R.C. 4928.40(A). *After that date, R.C. 4928.38 prohibits the commission from "authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility*," with certain exceptions not applicable here.

Columbus S. Power Co. at ¶16 (emphasis added). The Court struck down the stability charge at issue in *Columbus S. Power Co.* because "R.C. 4928.38 bars the 'receipt of transition revenues *or any equivalent revenues* by an electric utility' after 2010." Id. at ¶21

(emphasis in original). The Court continued: "By inserting the phrase 'any equivalent revenues,' the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name." Id.

Further, the Commission's reliance on the 2018 Supreme Court of Ohio decision is unjust and unreasonable as DP&L's Stability Charge is also distinguishable from AEP's PPA Rider that the Court deemed permissible.[22] The Court held that "even though R.C. 4928.38 bars transition revenue, the "notwithstanding" clause renders R.C. 4928.38 inapplicable *if the revenues are recoverable as one of the nine types of provisions listed in R.C. 4928.143(B)(2).*" *In re Application of Ohio Power Co.*, 155 Ohio St. 3d 326, 2018-Ohio-4698 at ¶19 (emphasis added) (*Ohio Power*). In *Ohio Power*, the Court continued: "Because, as we discuss below, the PPA Rider constitutes one of those types of provisions—specifically, a limitation on customer shopping under R.C. 4928.143(B)(2)(d)—it is permissible even if it otherwise could be deemed to constitute transition revenue." Id.

Conversely, DP&L's Stability Charge is not permissible under R.C. 4928.143(B)(2) as the Stability Charge is not a lawful charge as it is does not fall within one of the nine types of provisions delineated in R.C. 4928.143(B)(2)(d). The Commission has not found and it cannot find that the Stability Charge is a charge "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." R.C.

[22] December 2019 Order at ¶33.

4928.143(B)(2)(d). The only possible applicable provision would be default service. But, DP&L no longer provides default service. In fact, DP&L does not dispute that it is not providing default service to consumers. It cannot. The standard service offer or default service for generation service simply is no longer provided by DP&L. Instead, the standard service offer is provided by generation suppliers through a competitive bidding process, a provision that first appeared in ESP II. When approving the Blended ESP, DP&L retained the competitive sourcing of the standard service offer. Thus, DP&L cannot argue it provides default service under its Blended ESP or that the expired Stability Charge is related thereto. Accordingly, the "notwithstanding" language of R.C. 4928.143(B) does not apply and reinstating DP&L's Stability Charge constitutes an unlawful transition charge in violation of R.C. 4928.37 through 4928.40.

Lastly, DP&L no longer bears a provider of last resort (POLR) risk under the approved Blended ESP.[23] While DP&L may have been entitled to a POLR charge in the absence of such provisions under ESP I as it existed in 2009, and arguably in 2016, it is certainly not entitled to a POLR charge now when blending ESP I and ESP II together and retaining the competitive procurement process. The Commission unreasonably ignored the change in circumstances and facts that led to the original approval of the Stability Charge through the ESP I Stipulation and its approval of such in the initial June 2009 ESP I Order as well as its August 2016 Order. DP&L no longer provides generation service and POLR service is no longer being provided by DP&L as a utility service to its customers. Thus, under these changed facts and circumstances, the expired Stability Charge as a provision

[23] August 2016 Order at ¶23.

of ESP I should be set to zero unless and until DP&L actually provides POLR service and produces evidence to support the POLR charge to consumers.

C. Assignment of Error 3: The Commission Erred in Holding that Parties Are Barred from Challenging the Stability Charge.

The Commission erred in holding that Joint Applicants are barred from challenging the Stability Charge by the rehearing statute and the principles of *res judicata* or collateral estoppel.[24] First, the rehearing statute, R.C. 4903.10(B), does not serve as a bar to the challenge to the Stability Charge. As explained previously, the ESP I Stipulation was a compromised package of terms and conditions negotiated as a whole by the parties. And, as a compromise, the parties negotiated and agreed to a Stability Charge that expired on December 31, 2012, as part of the entire settlement package. Notwithstanding the settlement and contrary to the Commission's assertion,[25] the parties *did not* concede or represent that the Stability Charge was a lawful transition charge. See *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67 N.E.3d 734, ¶16 (finding that after December 31, 2010, "R.C. 4928.38 prohibits the commission from 'authoriz[ing] the receipt of transition revenue or any equivalent revenues by an electric utility,' " with certain exceptions.). As such, there was no need to file an application for rehearing when a settlement had been reached.

In determining whether the principles of *res judicata* and collateral estoppel apply, the Commission must look to the facts from the earlier action and determine whether the Stability Charge's lawfulness was litigated. See *Superior's Brand Meats, Inc. v. Lindley*,

[24] December 2019 Order at ¶¶32, 34, 35.

[25] December 2019 Order at ¶34.

62 Ohio St.2d 133, 403 N.E.2d 996, syllabus (1980) ("Ordinarily, 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*.") (emphasis added). Further, the Supreme Court of Ohio has held that the doctrine of collateral estoppel is inapplicable in the context of a settlement when there was no litigation of a point of law or finding of fact that was addressed by the Commission. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 at ¶¶10-12.

Here, there was no prior action in which the lawfulness of the Stability Charge was litigated. The Commission's finding that parties had "ample opportunity to oppose the RSC and to claim that the RSC was an unlawful transition charge but failed to raise this claim at that time" is unjust and unreasonable,[26] particularly in the context of a settlement. While parties always have the opportunity to litigate issues, that is not the standard. This is especially true where there is no prior litigated case. Here, the parties deliberately chose not to litigate these complex issues, as was articulated repeatedly throughout the ESP I Stipulation.[27]

Clearly, the stipulating parties chose to settle the matter in lieu of litigation and, under the terms of that settlement, the Stability Charge was set to expire on a date certain (December 31, 2012). Notably, no party made any arguments or concessions, one way or the other, regarding the lawfulness of the Stability Charge. Therefore, to conclude that the issue was actually and necessarily determined in a prior action is unjust and unreasonable.

[26] December 2019 Order at ¶34.

[27] ESP I Stipulation at 17-18.

To retroactively require Joint Applicants to have argued that the Stability Charge was unlawful back in 2009 is unreasonable, especially given the facts that (i) the stipulating parties to ESP I made no concessions regarding the lawfulness of the Stability Charge, and (ii) the stipulating parties expressly agreed the Stability Charge would expire on December 31, 2012.

Additionally, 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). As explained above, the fact that DP&L no longer bears a POLR risk under the approved Blended ESP raises a new material issue as to the lawfulness of the Stability Charge. In this regard, the Commission should have revisited and modified its prior decisions based on the change of circumstances. The Commission has been granted the power to do so as long as it explains why it altered its decision and the alteration is lawful. See, e.g., *In re: Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶16, 17.

Finally, these very issues – whether DP&L could blend provisions from prior ESPs and the lawfulness of the Stability Charge – were on appeal to the Supreme Court of Ohio when the Commission approved DP&L's ESP III.[28] As a result, the Supreme Court of Ohio dismissed those appeals as moot.[29] Significantly, the substantive issues were not decided by the Supreme Court of Ohio and remain ripe for challenge in this proceeding.

[28] See *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Officer in the Form of an Electric Security Plan*, 2017-Ohio-0204.

[29] See Case No. 2017-Ohio-0204, Dismissal, announced 2018-Ohio-4732.

Arguments regarding the lawfulness of DP&L's Stability Charge are not barred by res judicata or collateral estoppel.

III. CONCLUSION

OMA and Kroger respectfully request that the Commission grant rehearing and modify its December 2019 Order to prohibit DP&L from collecting unlawful charges through a blended ESP I, ESP II, and ESP III, contrary to the statutory mandates.

Respectfully submitted,

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Counsel of Record
Carpenter Lipps & Leland L.L.P.
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

Counsel for the Ohio Manufacturers' Association

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Counsel of Record
Carpenter Lipps & Leland L.L.P.
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
(614) 365-9145
paul@carpenterlipps.com
(willing to accept service by e-mail)

Counsel for The Kroger Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Application for Rehearing and Memorandum in Support of The Ohio Manufacturers' Association and The Kroger Company was electronically served via electric transmission on all parties of record on this 17th day of January 2020.

/s/ Kimberly W. Bojko _
Kimberly W. Bojko

Summary: Application Joint Application for Rehearing of The Ohio Manufacturers' Association and The Kroger Company electronically filed by Mrs. Kimberly W. Bojko on behalf of Ohio Manufacturers' Association and The Kroger Co.