BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power & 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 & Light Company For Approval of Revised Tariffs	)	Case No. 08-1095-EL-ATA
In the Matter of the Application of The Dayton Power & 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

APPLICATION OF HONDA OF AMERICA MFG., INC. AND THE CITY OF DAYTON OF THE SECOND FINDING AND ORDER

Pursuant to Section 4903.10 of the Ohio Revised Code and Rule 4901-1-35 of the Ohio Administrative Code, the City of Dayton and Honda of America Manufacturing, Inc. ("Joint Movants"), request rehearing of the Second Finding and Order issued in this proceeding on December 18, 2019. As demonstrated in the attached Memorandum in Support, the Second Finding and Order is unreasonable and unlawful on the following ground:

1. The Second Finding and Order is unlawful and unreasonable for allowing Dayton Power & Light ("DP&L") to reinstall Rider RSC.
2. The Second Finding and Order is unlawful and unreasonable for failing to require DP&L to honor its ESP I economic development commitments.

As demonstrated in the attached Memorandum in Support, the Commission should grant the Joint Movants' Application for Rehearing.

Respectfully submitted,

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ATTORNEYS FOR HONDA AND CITY OF DAYTON

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MEMORANDUM IN SUPPORT OF APPLICATION OF HONDA OF AMERICA MFG., INC. AND THE CITY OF DAYTON OF THE SECOND FINDING AND ORDER

I. INTRODUCTION

The Commission's December 18, 2019 Second Finding and Order ("Order") was, in many respects, correct. However, the Commission erred when it relied on the doctrines of res judicata and collateral estoppel to allow Dayton Power & Light ("DP&L") to continue to collect the Rate Stabilization Charge ("RSC") until the required 4-year review is complete. Ohio law does not mandate that riders created in 2008 remain in place forever so long as DP&L continues to repeatedly withdraw from ESP's.

To the extent the Commission determines it is required to keep all provisions, terms, and conditions of ESP I, the Commission also erred by failing to require DP&L to reinstitute the economic development provisions from ESP I. The economic development provisions are "terms" just like the provisions benefitting DP&L and should be reinstituted.

II. THE COMMISSION ERRED BY REINSTITUTING RIDER RSC.

A. The doctrines of res judicata and collateral estoppel do not apply because this is a fundamentally different issue than was ruled on previously and material facts have changed.

The Commission approved Rider RSC because it found that this result was mandated by the doctrines of res judicata and collateral estoppel. The Commission erred by applying those legal doctrines in this case. As was acknowledged by the *Ohio Power* case cited in the Order, the doctrines are intended to apply to "relitigation of a point of law or fact that was at issue in a former action. . ."[1] These doctrines do not apply where a party seeks to litigate different facts or points of law than was previously litigated.

Even if res judicata and collateral estoppel applied, there is an exception to the doctrine of res judicata and collateral estoppel that has been recognized in Ohio.

> 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 [r]es judicata nor the doctrine of collateral estoppel will bar litigation of that issue in the later action.

State ex rel. Westchester Estates, Inc. v. Bacon, 61 Ohio St.2d 42, 45, 399 N.E.2d 81, 83 (1980).

This exception has been reiterated in several recent Ohio cases. *See, e.g., Dinks II Co. v. Chagrin Falls Village Council*, 8th Dist. Cuyahoga No. 84939, 2005-Ohio-2317 (stating that changed circumstances sufficient to negate the doctrine of res judicata is well-founded Ohio law); *Stand Energy Corp. v. Ruyan*, 1st Dist. Hamilton No. C-050004, 2005-Ohio-4846, ¶ 15 ("In the absence of changed circumstances or newly discovered grounds for relief, the trial court correctly held that res judicata barred [plaintiff's] attempt to relitigate against [defendant] its

[1] Order p. 12. See also, *Ohio Power Co.*, 2015-Ohio-2056 at ¶ 20 (quoting *Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985)).

claim for the unpaid gas invoices."); *Chagrin Falls v. Geauga Cty. Bd. of Commrs.*, 11th Dist. Geauga No. 2003-G-2530, 2004-Ohio-5310, ¶ 44, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226 (1995) ("The Supreme Court of Ohio has clarified that res judicata will not be applicable if the party attempting to avoid this doctrine can demonstrate 'changed circumstances.'"). Thus, a party trying to avoid the application of res judicata must "establish a change that raised a new material issue relating to its second petition or a change relevant to the resolution of a material issue involved in the original petition." *Chagrin Falls* at ¶ 46.

1. **The parties have not litigated whether Rider RSC can be approved as a POLR charge when DP&L no longer owns generation.**

In 2009 DP&L provided generation service to non-shopping customers using its own generation. DP&L had POLR responsibility for shopping customers who may return to non-shopping service. Today DP&L no longer owns generation and POLR risk is borne by wholesale auction participants. The parties have not had the opportunity to address whether Rider RSC is appropriate once DP&L no longer owns generation. Accordingly, the doctrine of collateral estoppel simply does not apply to this fact pattern.

2. **The parties have not litigated the proper rate for the POLR service DP&L is allegedly providing today.**

The second major difference is the change in time period. While the Commission has previously found Rider RSC was a term of the stipulation it has never previously discussed the **rate** for Rider RSC today. Just like it did for the Fuel clause, the Commission retains discretion to change the rate for a term and condition of the ESP to reflect current realities. The parties have never before litigated the rate which is appropriate in 2020 and therefore res judicata does not apply.

a. Procedural History

Over sixteen years ago, on September 3, 2003, the Commission approved a stipulation which extended DP&L's market development period to December 31, 2005, and provided for a rate stabilization plan from January 1, 2006, through December 31, 2008 ("RSP Stipulation"). The RSP Stipulation also provided for the creation and implementation of a rate stabilization surcharge ("RSS").[2] On April 5, 2005, DP&L filed its application to establish the RSS. On December 28, 2005, the Commission approved a modified stipulation which, among other things, established the RSC now at issue.[3]

On June 24, 2009, the Commission issued its Opinion and Order in this proceeding, approving a stipulation and recommendation ("Stipulation") to establish The Dayton Power & Light Company's ("DP&L") first Electronic Security Plan ("ESP") (hereinafter, "ESP I"). In the ESP I Order, the Commission set a date certain for the expiration of the RSC: **December 31, 2012**.[4] Moreover, the Order stated that customers of government aggregation who elected not to pay the RSC in 2011 and 2012 would return to electric utility service at market-based rates rather than at the SSO rate under the applicable tariff.[5] Regardless, the Commission's Order made clear that the RSC would expire at the end of 2012.

Thereafter, on December 19, 2012, the Commission extended ESP I until it authorized a subsequent Standard Service Offer ("SSO"). On September 4, 2013, in Case No. 12-426-EL-

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[2] *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2279-EL-ATA, et al., Opinion and Order (September 2, 2003).

[3] *In re Dayton Power and Light Company*, Case No. 05-276-EL-AIR, Opinion and Order (December 28, 2005) ("2005 Order"). *See In re Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Opinion and Order, at 3, 5 (June 24, 2009) (hereinafter, "ESP I Order") (describing the rate stabilization charge approved in the 2005 Order as the RSC).

[4] ESP I Order, at 5, 13. *See also* Stipulation and Recommendation, Case No. 08-1094-EL-SSO (Feb. 24, 2009) ("The current RSS charge will continue as a nonbypassable charge through December 31, 2012.").

[5] *Id.*

SSO (hereinafter, "ESP II"), the Commission approved DP&L's proposal for a second ESP with certain modifications. However, on June 20, 2016, the Supreme Court of Ohio reversed the Commission's decision in ESP II.[6] DP&L withdrew from ESP II on July 27, 2016. The RSC was subsequently approved for an additional interim period until ESP III was approved on October 20, 2017.

b. The Commission's prior decisions did not address this point or provide a current justification of the RSC rate.

Joint Movants anticipate that DP&L will point to its 2012 motion to postpone the expiration of the RSC until the Commission issued an order on the pending ESP II Case to argue the Commission has already agreed to extend RSC beyond 2012 at a static rate. On December 19, 2012, the Commission permitted DP&L to continue to collect revenues from the RSC but only until a subsequent SSO was approved.[7] The RSC remained in place until September 4, 2013, when the Commission approved a modified stipulation in the ESP II Case. The RSC was then placed back into place for another temporary period when DP&L withdrew from ESP II on July 27, 2016 until ESP III was approved on October 20, 2017.[8] In that decision the Commission found that because no party had appealed the 2013 decision in ESP I that the RSC was a term of the ESP then the doctrines of res judicata and collateral estoppel barred any further litigation of this point.[9]

To the extent DP&L makes this argument it will be ignoring a fundamental difference in facts which differentiate these arguments. In 2009 when ESP I was approved, and again in 2013

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[6] *In re The Dayton Power and Light Co*., 2016-Ohio-3490 (June 20, 2016).

[7] Cite.

[8] *See* ESP I Finding and Order dated August 26, 2016.

[9] *Id*. pp. 9-10.

and 2016 when the Commission subsequently addressed this issue, DP&L still owned generation assets. As DP&L no longer owns those assets there has been a fundamental change in the service which DP&L is providing. As such, it is appropriate for the Commission to determine if the rate to be charged should be modified to reflect the actual services which are being provided in 2020.

That is important because the Supreme Court has specifically held that a POLR charge must be justified from a cost perspective.[10] After the Commission instituted Rider RSC the Ohio Supreme Court made clear that POLR charges must be based on the cost of providing POLR service.[11]

> Below, the commission approved a POLR charge totaling over $500 million over the term of the ESP. It described the charge as cost-based. "[T]he POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith * * *." (Emphasis added.) Likewise, it stated that it was allowing recovery of "estimated POLR costs." (Emphasis added.) Again on rehearing, the commission stated that it had "determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider." (Emphasis added.) This characterization of the POLR charge as cost-based lacks any record support; therefore, we reverse the portion of the order approving the POLR charge.[12]

As there has been a material factual change since the previous extensions of Rider RSC the Commission must follow this binding precedent. Doing so is not only legal required, it is also fair to all parties instead of providing DP&L with an unjustified windfall, in violation of Ohio law, forever. The Commission should maintain Rider RSC as a term of the ESP, but

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[10] *In re Columbus Southern*, 128 Ohio St. 3d 512, 518-19 (2011) (finding the Commission erred by failing to base POLR charge on appropriate record evidence).

[11] *In re Columbus Southern*, 128 Ohio St. 3d 512, 518-19 (2011)128 Ohio St. 3d 512

[12] *In re Application of Columbus S. Power Co*., 128 Ohio St. 3d 512, 518, 947 N.E.2d 655, 663 (2011).

require DP&L to establish the appropriate rate for Rider RSC today based on the actual costs incurred by DP&L.

c. The Commission has held it is not required to maintain the same rates for ESP I riders continued after 2012.

DP&L may also claim that the rate of Rider RSC must be maintained. This is incorrect. The Commission has specifically held it is not required to maintain the same rates in this circumstance in the context of the energy efficiency rider. "R.C. 4928.143(C)(2)(b) does not require the Commission to reestablish the 'rates' of the previous SSO; the statute requires the Commission to continue the 'provisions, terms, and conditions' of the previous SSO."[13]

The Commission has previously specifically held it was not to maintain the same rate after 2012 in an identical circumstance. When the Commission addressed DP&L's continued rates in 2016 it discussed DP&L's Environmental Investment Rider ("EIR"). The "EIR authorized DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax costs to install environmental control devices on its generating units."[14] The Commission found that since facts had changed and the EIR was no longer justified it should remain in place but be set to zero.[15] The Commission found it

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[13] ESP I Finding and Order dated August 26, 2016, p. 11.

[14] ESP I Finding and Order dated August 26, 2016, p. 8.

[15] ESP I Finding and Order dated August 26, 2016, pp. 8-9. ("With respect to the EIR, the Commission notes the EIR is a by-passable rider, and thus, was part of the rate offered to non-shopping customers in ESP I. The EIR was authorized in ESP I to allow DP&L to recover environmental plant investments and incremental operations and maintenance, depreciation, and tax expenses to install environmental control devices on its generating units to comply with US EPA regulations. However, when the EIR was originally authorized, those generating units were being used to provide public utility service to non-shopping customers as part of the standard service offer. With the implementation of the competitive bidding process to procure retail electric generation from wholesale suppliers, those generating units and their associated environmental controls are not currently being used to provide public utility service to non-shopping customers under the standard ser-vice offer. Therefore, while the EIR is a provision, term, or condition of ESP I, the environmental controls for which the EIR recovered DP&L's investments are no longer used and useful in rendering public utility service to customers. Accordingly, similar to the fuel rider, the EIR should be approved as a provision, term, or condition of ESP I, but should be set to zero. We also note the SSO for

specifically important to note that since the generating units were no longer being used to provide public utility service they

> "are not currently being used to provide public utility service to non-shopping customers under the standard service offer. Therefore, while the EIR is a provision, term, or condition of ESP I, the environmental controls for which the EIR recovered DP&L's investments are no longer used and useful in rendering public utility service to customers. Accordingly, similar to the fuel rider, the EIR should be approved as a provision, term, or condition of ESP I, but should be set to zero."[16]

The Commission's analysis in this paragraph is exactly correct and can be used almost verbatim to show why the RSC must be changed.

While the Commission did not extend this analysis to the RSC in 2016, there was good reason for this differentiation in 2016. DP&L still owned generation and retained the long-term POLR obligation that it could conceivably have met with that generation. That does not exist today, and so the Commission should follow the precedent it established with the EIR and adjust the rate to zero.

B. The Commission's precedent makes clear the Commission retains discretion as needed to modify the ESP to reflect other Ohio legislative priorities.

In addition to the change to the EIR addressed above, the Commission did not retain all of the terms and conditions of ESP I. The Commission specifically rejected the IEU-Ohio, OMA, and Kroger argument that all ESP terms must be retained, including the bypassable transmission cost recovery rider, storm cost rider, shared savings, and energy efficiency rider

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non-shopping customers in ESP I included base generation rates, the EIR, and the fuel rider. Thus, the energy and capacity obtained by the competitive bidding process should replace the EIR, as well as base generation rates and the fuel rider. As pro-posed by DP&L, the costs of such energy and capacity will be re-covered through the standard offer tariff.")

[16] ESP I Finding and Order dated August 26, 2016, p. 9.

rates. "The parties argue that R.C, 4928.143(C)(2)(b) requires DP&L to implement ESP I exactly as it was."[17]

The Commission specifically rejected this position, finding that because the market had come to rely on these changes it would be inappropriate to disrupt the wholesale and retail markets. "[T]he Commission finds the elimination of the transmission cost recovery riders, TCRR-B and TCRR-N, would unduly disrupt both the competitive bidding process supplying the SSO and individual customer contracts with suppliers of competitive retail electric service (CRES Providers)."[18] The Commission also found it important that these rates could be removed for an interim period, thereby potentially disrupting the competitive market.

Whatever the Commission's reasons, the precedent created by this decision was clear. If the Commission has authority to choose not to reimpose those terms of ESP I for an interim period, then it also has the authority not to reimpose RSC for this interim period.

The Commission should apply that authority in this circumstance. The 2011 AEP POLR case made clear that the RSC charge is not justified today under Ohio law since the rate is not based on any costs incurred by DP&L. It would be inappropriate to allow that charge to continue, potentially forever, in violation of Ohio law just because it was a term of ESP I.

C. The Commission should consider the impact to customers.

When the Commission granted an extension of the RSC on December 19, 2012, it was in the context of a DP&L ESP application which had been pending since March 30, 2012. As the Commission issued that decision 264 days after DP&L's application was filed perhaps the Commission anticipated a quick decision on the ESP II application. Unfortunately for customers

[17] *See* ESP I Finding and Order dated August 26, 2016, p. 6.

[18] ESP I Finding and Order dated August 26, 2016, p. 10.

the Commission did not ultimately rule until September 4, 2013 (523 days after DP&L's initial application), meaning that customers were forced to pay the improper RSC for an additional 9 months.

ESP III was also pending for a lengthy period. DP&L's application was filed on February 22, 2016. DP&L withdrew from ESP II on July 27, 2016 (156 days after ESP II had been filed), so once again when the Commission ordered the RSC to remain in place it may have anticipated a timely new standard service offer. Again unfortunately for customers, ESP III was not approved until October 20, 2017, or 606 days after the application was originally filed.[19]

DP&L's history of ESP proceedings shows the substantial impact this decision can have on customers. DP&L's last two ESP applications were pending for 523 and 606 days respectively. Therefore, if the Commission allows the RSC to continue it will impact customers for a lengthy period of time.

The potential negative impact on customers is particularly acute in this situation. R.C. 4928.143(C)(2)(a) states that in this circumstance DP&L "may file a new standard service offer under this section." DP&L has not filed any new standard service offer at this point, and has given no indication it intends to in the future. Therefore, the Commission's decision in this proceeding could mean Rider RSC remains in place for an indefinite period until a new SSO application is filed, plus an additional period while the application is pending which recent experience has shown can exceed 600 days. The Commission should take this circumstance into account when determining how to address this situation.

[19] *See* ESP I Finding and Order dated August 26, 2016.

III. THE COMMISSION ERRED BY FAILING TO REINSTITUTE THE ECONOMIC DEVELOPMENT PROVISIONS WHICH BENEFIT CUSTOMERS.

To the extent the Commission finds that it is obligated to maintain all terms and conditions of ESP I, ESP I included several provisions relating to economic development. Relevant here, DP&L committed to provisions benefitting Joint Movants in the Stipulation filed February 24, 2009.[20] It would be inequitable for DP&L to be permitted to maintain the stipulation provisions which benefit DP&L like Rider RSC without allowing customers to maintain the provisions which benefit them. Therefore, the Commission should order DP&L to continue their economic development commitments.

Joint Movants anticipate DP&L may argue that the economic development commitments were all limited in time to a specific period. DP&L is certainly correct about that, as many provisions were given express termination dates in the ESP I Stipulation. However, this argument fails because Rider RSC was also expressly given a termination date. If the Commission finds that Rider RSC must be continued as a term of the ESP then so must the economic development provisions. As such, this anticipated argument should be rejected.

[20] ESP I Stipulation, p. 12.

IV. CONCLUSION

WHEREFORE, Joint Movants respectfully request that the Commission grant hearing on these grounds.

Respectfully submitted,

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ATTORNEYS FOR HONDA AND CITY OF DAYTON

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 17th day of January, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
One of the Attorneys for Honda and City of Dayton

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

Summary: Application For Rehearing of Second Finding and Order dated December 18, 2019 electronically filed by Mr. Trevor Alexander on behalf of Honda of America Mfg., Inc. and City of Dayton