

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of : Case No. 16-0395-EL-SSO
The Dayton Power and Light Company for
Approval of Its Electric Security Plan :

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

In the Matter of the Application of : Case No. 16-0397-EL-AAM
The Dayton Power and Light Company for
Approval of Certain Accounting Authority :
Pursuant to Ohio Rev. Code § 4905.13

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO THE OFFICE OF
THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING**

I. INTRODUCTION AND SUMMARY

The Commission should reject the Application for Rehearing filed by The Office of the Ohio Consumers' Counsel ("OCC")) because The Dayton Power and Light Company ("DP&L") had a statutory right to terminate this case. R.C. 4928.143(C)(2)(a).

II. DP&L HAD AN "ABSOLUTE STATUTORY RIGHT" TO WITHDRAW AND TERMINATE THIS PROCEEDING

OCC argues that DP&L did not have a right under R.C. 4928.143(C)(2)(a) to terminate this case. The Commission has already rejected that argument and held that DP&L had an "absolute statutory right" to withdraw and terminate this proceeding:

"The Commission finds that, under R.C. 4928.143(C)(2)(a), DP&L has an absolute statutory right to withdraw its Application for ESP III, thereby terminating it, and that nothing in the Amended

Stipulation constitutes a waiver of that right. R.C. 4928.143(C)(2)(a) unambiguously 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 under [R.C. 4928.142].'

Stated simply, R.C. 4928.143(C)(1) requires that the Commission issue an order that does 'one of three things: (1) approve, (2) modify and approve, or (3) disapprove the application.' *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 24. The Supreme Court of Ohio has 'stated on numerous occasions that if the meaning of a statute is clear on its face, then it must be applied as it is written.' *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E. 2d 611 (1994). Thus, a plain reading of R.C. 4928.143(C)(2)(a) demonstrates that the only statutory precondition to the utility's right to withdraw the application is that the Commission modify and approve the application by order. The Commission issued the November 21, 2019 Supplemental Opinion and Order modifying and approving DP&L's Application for ESP III. No other action need occur to trigger DP&L's statutory right under R.C. 4928.143(C)(2)(a) to withdraw that application, thus terminating ESP III. "

Dec. 18, 2019 Finding and Order, ¶ 16 (emphasis added).

That holding by the Commission was correct. Specifically, DP&L filed its initial Application in this case on February 22, 2016, and its Amended Application on October 11, 2016 (together, the "Application"). The Amended Application requested a Distribution Modernization Rider ("DMR"). Oct. 11, 2016 Amended Application, ¶¶ 2-7. On March 14, 2017, DP&L, the Commission's Staff, and a diverse group of knowledgeable and capable parties filed an Amended Stipulation and Recommendation ("Stipulation"), which included a DMR. Stipulation, § II.2. The Commission modified and approved the Stipulation on October 20, 2017, and further "modified and approved" the Stipulation on November 21, 2019. Nov. 21, 2019 Supplemental

Opinion & Order, ¶ 134. The latter modification ordered DP&L to remove the DMR and related economic development incentives from its tariffs. *Id.* ¶ 110.

DP&L then filed a notice of withdrawal of its application in this case (Nov. 26, 2019 Notice of Withdrawal), which the Commission approved (Dec. 18, 2019 Finding & Order).

The Supreme Court's decision in In re Ohio Power Co., 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 establishes that DP&L had the right to withdraw and terminate ESP III in response to the Commission's November 21, 2019 Supplemental Opinion & Order that modified the Stipulation, which had been approved by the Commission in its October 20, 2017 Opinion and Order in this case. (The Stipulation was not effective until it was approved by the Commission's Order. Ohio Admin. Code 4901-1-30(E.))

In the Ohio Power case, the Commission had issued an order approving an ESP for Ohio Power, and then years later, the Commission issued an order that modified Ohio Power's ESP in a separate case even after the ESP had terminated. In re Ohio Power Co., 2015-Ohio-2056, ¶¶ 24-26. The situation here is even more clear, in that the Commission issued an order in ESP III on October 20, 2017 that approved DP&L's ESP, and subsequently issued the Supplemental Opinion & Order that modified that same ESP. In the Ohio Power case, the Court held that the Commission's second order modified Ohio Power's ESP application and triggered Ohio Power's right to withdraw under R.C. 4928.143(C)(2)(a). *Id.* at ¶¶ 27-30.

In particular, in that case, the Court rejected the Commission's argument that the Commission's second order did not trigger R.C. 4928.143(C)(2)(a) because that order modified a prior Commission order, not an ESP application:

"The commission found that the statutory right to withdraw was not implicated in this case, because R.C. 4928.143(C)(2)(a) 'specifically pertains to the Commission's approval and modification of an application for an ESP'. . . . Because this case does not involve approval of an ESP application, the commission determined that the statutory withdrawal provision 'ha[d] no bearing on the outcome.' Id., ¶ 27 (citations omitted.)

* * *

What the commission overlooks is that when it modified the ESP Order in this case, it effectively modified the application that was approved by that order.

* * *

The commission's interpretation nullifies the clear purpose of R.C. 4928.143(C)(2)(a), namely, to allow a utility to withdraw its proposed ESP if it dislikes the commission's modifications. But broader problems exist with the commission's reading. As read by the commission, R.C. 4928.143(C)(2)(a) applies only when the commission is deciding the fate of the ESP application. On this reading, the commission could modify an ESP at any time after the application has been approved—even while the ESP is still in effect—and the utility would have no recourse but to implement the change. This would hardly be a 'just and reasonable result.' R.C. 1.47(C)." Id. ¶¶ 29-30.

Here, the Commission's Supplemental Opinion & Order (¶ 110) eliminated the DMR that the Commission had approved in its October 20, 2017, 2017 Opinion & Order. Under Ohio Power, the Commission's Supplemental Opinion & Order thus modified and approved DP&L's ESP III application, and DP&L had the right under R.C. 4928.143(C)(2)(a) to withdraw and terminate that application.

In addition to the statutory language and controlling Supreme Court precedent, the Commission should reject OCC's arguments for the following reasons:

1. OCC ignores the governing statute: The principal defect in OCC's argument is that OCC ignores the statutory text. Specifically, the statute provides that DP&L has

a right to withdraw and terminate "[i]f the Commission modifies and approves an application under division (c)(1)." OCC does not dispute that the Commission modified and approved DP&L's ESP III application.

The Commission specifically held that its "November 21, 2019 Supplemental Opinion and Order modif[ied] and approv[ed] DP&L's Application for ESP III." Dec. 18, 2019 Finding and Order, ¶ 16. That is all that is needed for DP&L to have a right to withdraw and terminate ESP III under R.C. 4928.143(C)(2)(a). Since OCC does not dispute that the Commission modified and approved DP&L's ESP III Application, the Commission should reject all of OCC's arguments.

2. The Commission voided the DMR: OCC (pp. 4-6) makes the puzzling argument that the Commission's December 19, 2019 Finding and Order "circumvents" the Supreme Court's decision in Ohio Edison in which the Court held that FirstEnergy's DMR was unlawful. In re Application of Ohio Edison Co., 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 18 (emphasis in original). That argument is puzzling because the Commission expressly ordered DP&L to remove the DMR from its tariffs (Nov. 21, 2019 Supplemental Opinion and Order, ¶ 124) and DP&L has done so (Nov. 29, 2019 Revised Tariffs).

Nothing in the Court's Ohio Edison decision addressed R.C. 4928.143(C)(2)(a), or a utility's right to withdraw and terminate an ESP. The Court's Ohio Edison decision thus has nothing to do with the issues here.

3. It is possible to revert to ESP I: OCC also argues (pp. 6-9) that it is "impossible" to revert to ESP I rates. That argument ignores the fact that R.C. 4928.143(C)(2)(b) provides that the Commission "shall" do so and that the Commission has done so twice.

Aug. 26, 2016 Finding and Order, ¶¶ 19-28 (Case No. 08-1094-EL-SSO); Dec. 18, 2019 Second Finding and Order, ¶¶ 26-42. (Case No. 08-1094-EL-SSO.)

OCC further argues (p. 8) that reverting to ESP I would result in "going back to a standard service offer that is price based on DP&L supplying the power, instead of the auction-based standard service." That is simply not true. DP&L previously withdrew ESP II (Case No. 12-426-EL-SSO) and reverted to ESP I. July 27, 2016 DP&L Motion to Withdraw (Case No. 12-426-EL-SSO). ESP I was therefore the operative ESP that was in place before ESP III was approved. In ESP I, after DP&L reverted to ESP I from ESP II, the Commission approved the continuation of setting the SSO price using competitive bidding. Aug. 26, 2016 Finding and Order, ¶ 21 (Case No. 08-1094-EL-SSO).

OCC (p. 7) also attempts to employ the *in pari materia* judicial construction canon well beyond the intended use. "[W]hen the words of a statute are unambiguous, a court has 'no cause to apply the rules of statutory construction.'" State ex rel. Cincinnati Enquirer v. Pike Cty. Gen. Health Dist., 154 Ohio St.3d 297, 2018-Ohio-3721, 114 N.E.3d 152, ¶ 22 (quoting State ex rel. Clay v. Cuyahoga Cty. Med. Examiner's Office, 152 Ohio St.3d 163, 2017-Ohio-8714, 94 N.E.3d 498, ¶¶16-17). The Supreme Court has reversed appellate court decisions where the court of appeals "disregarded the plain language of the statute and decided instead to rely upon a canon of statutory construction." State ex rel. Cincinnati, 2018-Ohio-3721, ¶ 22. The Court has found that the language of R.C. 4928.143(C)(2)(a) has a "clear purpose." In Re Ohio Power Co., 2015-Ohio-2056, ¶ 30. Indeed, OCC's statutory canon of construction reading would render R.C. 4928.143(C)(2)(a) completely meaningless and without power, which violates "the canon of statutory construction that '[n]o part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision

meaningless or inoperative." State v. Noling, 153 Ohio St.3d 108, 2018-Ohio-795, 101 N.E.3d 435, ¶ 36 (quoting State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp., 95 Ohio St. 367, 373, 116 N.E. 516 (1917)).

Finally, OCC (p. 9) attempts to read the words into the statute such that "the electric distribution utility may withdrawal within a relatively short period of time after implementing its electric security plan" into R.C. 4928.143(C)(2)(a). As previously stated, the Supreme Court of Ohio has specifically rejected the notion that there is any sort of time limit on the rights contained in R.C. 4928.143(C). See In re Ohio Power Co., 2015-Ohio-2056, ¶¶ 27-30.

4. The statute controls, so OCC's other arguments are irrelevant: OCC argues (pp. 9-12) that the Commission failed to address several of OCC's arguments. However, the Commission's holding that DP&L has an "absolute statutory right" to withdraw and terminate ESP III renders all of OCC's other arguments superfluous. Dec. 18, 2019 Finding and Order, ¶ 16. Since OCC does not dispute that the Commission "modified and approved" DP&L's ESP III application -- which triggers DP&L's right to withdraw and terminate under R.C. 4928.143(C)(2)(a) -- OCC's other arguments all necessarily fail.

In any event, the Commission should reject those arguments for the following reasons:

(a) Impossible to implement ESP I: OCC argues (p. 10) that it is impossible to revert to DP&L's prior rates. As demonstrated above, that is not true.

(b) Reversion to SSO: OCC argues (p. 11) that in ESP I, the Commission was limited to implementing an SSO. That argument relates to rates that should be in place in ESP I

after ESP III has terminated, so it is not an issue for this case. OCC raises the same issue in its application for rehearing in ESP I, and DP&L demonstrates that the argument is flawed in that case.

(c) Ohio Edison: OCC argues (p. 11) that the Commission ignored the Supreme Court's decision in Ohio Edison. As demonstrated above, that is not so.

(d) Too late: OCC argues (pp. 11-12) that it is too late for DP&L to withdraw its ESP III. Not so, for two reasons: First, DP&L filed its notice of withdrawal five days after the Commission's November 21, 2019 Supplemental Opinion and Order that terminated the DMR. DP&L acted very promptly. Second, in Ohio Power, the Supreme Court held that a utility still had a right to withdraw and terminate even after the ESP had terminated. 144 Ohio St.3d ¶¶ 27-30. The right to withdraw thus is not limited in time.

III. CONCLUSION

The Commission should deny OCC's application for rehearing.

Respectfully submitted,

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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 The Office of the Ohio Consumers' Counsel's Application for Rehearing has been served via electronic mail upon the following counsel of record, this 3rd day of February, 2020:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to The Office of The Ohio Consumers' Counsel's Application for Rehearing electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company