THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF THE DAYTON POWER AND 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 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.	**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**

FIFTH ENTRY ON REHEARING

Entered in the Journal on June 16, 2021

I. SUMMARY

{¶ 1} In this Fifth Entry on Rehearing, the Commission grants, in part, and denies, in part, the application for rehearing filed by the Ohio Consumers' Counsel.

II. PROCEDURAL HISTORY

{¶ 2} The Dayton Power and Light Company (DP&L or the Company) is a public utility as defined under R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility (EDU) shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO)

in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} R.C. 4928.143(C)(2)(b) provides that if a utility terminates an application for an ESP or if the Commission disapproves an application, the Commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent SSO is authorized.

{¶ 5} By Opinion and Order issued in this case on June 24, 2009, the Commission adopted the stipulation and recommendation of the parties (ESP I Stipulation) to establish DP&L's first ESP (ESP I). Included among the terms, conditions, and charges in ESP I was a rate stabilization charge (RSC). Thereafter, on December 19, 2012, the Commission extended ESP I, including the RSC, until a subsequent SSO could be authorized. Entry (Dec. 19, 2012) at 3-5.

{¶ 6} On September 4, 2013, the Commission modified and approved DP&L's application for a second ESP (ESP II). *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al. (*ESP II Case*), Opinion and Order (Sept. 4, 2013). On June 20, 2016, the Supreme Court of Ohio issued an opinion reversing the decision of the Commission approving ESP II and disposing of all pending appeals. *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, 62 N.E.3d 179. Thereafter, on August 26, 2016, in the *ESP II Case*, the Commission modified ESP II as directed by the Court and then granted DP&L's application to withdraw ESP II, thereby terminating it. *ESP II Case,* Finding and Order (Aug. 26, 2016). In light of DP&L's withdrawal of ESP II, the Commission, pursuant to R.C. 4928.143(C)(2)(b), granted DP&L's application in this case to implement the provisions, terms and conditions of ESP I, its most recent SSO, until a subsequent SSO could be authorized. Finding and Order (Aug. 26, 2016), Third Entry on Rehearing (Dec. 14, 2016).

{¶ 7} The provisions, terms and conditions of ESP I remained in effect until the Commission modified and approved an amended stipulation establishing DP&L's third electric security plan (ESP III), effective November 1, 2017. *In re Dayton Power and Light Co.*, Case No. 16-395-EL-SSO (*ESP III Case*), Opinion and Order (Oct. 20, 2017) at ¶ 131. The Supreme Court of Ohio then dismissed as moot the appeals of the August 26, 2016 Finding and Order which reinstated ESP I, including the RSC. *In re Application of Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507, *reconsideration denied,* 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 545.

{¶ 8} Subsequently, Interstate Gas Supply, Inc. (IGS) withdrew from the amended stipulation in the *ESP III Case*, necessitating an additional evidentiary hearing in that proceeding. *ESP III Case,* Entry (Nov. 15, 2018). Following the additional evidentiary hearing, the Commission issued a Supplemental Opinion and Order in the *ESP III Case*. In the Supplemental Opinion and Order, the Commission further modified and approved the amended stipulation filed in the *ESP III Case,* eliminating DP&L's distribution modernization rider (DMR), in light of the Supreme Court of Ohio's decision 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-3331, 129 N.E.3d 454, and *reconsideration denied*, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458. *ESP III Case*, Supplemental Opinion and Order (Nov. 21, 2019) at ¶¶ 1, 102-110, 134.

{¶ 9} On November 26, 2019, DP&L filed a notice of withdrawal of its application and amended application filed in the *ESP III Case*, pursuant to R.C. 4928.143(C)(2)(a). DP&L also filed on November 26, 2019, proposed tariffs in this proceeding to implement the provisions, terms and conditions of ESP I, its most recent ESP prior to ESP III. On December 4, 2019, comments were filed by Ohio Energy Group, Ohio Hospital Association, Industrial Energy Users-Ohio (IEU-Ohio) and the Retail Energy Supply Association (RESA). Joint comments were filed on December 4, 2019 by City of Dayton and Honda of America Mfg., Inc. (Dayton/Honda). Further, Ohio Consumers' Counsel (OCC), Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) (collectively, Consumer Groups) filed a

motion on December 4, 2019, seeking rejection of DP&L's proposed tariff filing. DP&L filed a memorandum contra the Consumer Groups' motion on December 10, 2019. Consumer Groups filed a reply on December 17, 2019.

{¶ 10} The Commission accepted the withdrawal of ESP III in the *ESP III Case* on December 18, 2019. *ESP III Case,* Finding and Order (Dec. 18, 2019). On December 18, 2019, in this proceeding, the Commission also approved DP&L's proposed tariffs, implementing the provisions terms and conditions of ESP I, subject to the modifications directed by the Commission. Second Finding and Order (Dec. 18, 2019). Subsequently, on January 17, 2020, applications for rehearing were filed by IEU-Ohio, IGS, OCC, and Dayton/Honda, and a joint application for rehearing was filed by OMA and Kroger.

{¶ 11} Thereafter, on January 22, 2020, DP&L filed a motion for an extension of time to file memorandum contra to the applications for rehearing filed by on January 17, 2020, and a request for expedited consideration. The motion for extension of time was granted by the attorney examiner, and DP&L filed its memorandum contra on February 3, 2020. On February 4, 2020, RESA filed a motion for leave to file memorandum contra instanter to the application for rehearing filed by IGS.

{¶ 12} On February 14, 2020, the Commission issued a Fourth Entry on Rehearing, in which it denied the application for rehearing filed by IGS and granted the remaining applications for rehearing for the purpose of further consideration in the matters raised in the applications for rehearing. Fourth Entry on Rehearing (Feb. 14, 2020).

III. DISCUSSION

A. First Assignment of Error

{¶ 13} In its first assignment of error, OCC claims that the Commission erred when it continued the terms of DP&L's "electric security plan" rather than continuing the utility's "standard service offer". OCC further asserts that the Commission violated Ohio law and unreasonably increased rates to customers. OCC posits that the SSO means the costs of

energy generation to serve SSO customers, no more and no less. An ESP, by contrast, is much broader and can include all charges enumerated in R.C. 4928.143(B)(2). OCC claims that these enumerated charges are part of the ESP but not part of the SSO. Therefore, OCC argues that the Commission erred by including provisions authorized by R.C. 4928.143(B)(2) as provisions, terms and conditions of the most recent SSO.

{¶ 14} In its memorandum contra the application for rehearing, the Company disputes OCC's claim that the SSO means the costs of energy generation to serve SSO customers. DP&L argues that, as established by R.C. 4928.141, an SSO is either an ESP or an MRO. Thus, when 4928.143(C)(2)(b) provides that an EDU shall revert to its most recent SSO, it means that DP&L must revert to ESP I in its entirety and is not limited to the supply of generation.

{¶ 15} The Commission notes that R.C. 4928.141 requires each EDU to "provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code." R.C. 4928.142 states that an EDU "may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer." R.C. 4928.143 provides that "[f]or the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan * * *." Thus, we find that, under the plain language of the statute, an SSO may be a MRO or an ESP. Moreover, R.C. 4928.143(C)(2)(b) states, in relevant part:

> If the utility terminates an application pursuant to division (C)(2)(a) of this section * * * the commission 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 from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively. (Emphasis added).

It is beyond dispute that, at the time DP&L withdrew from and terminated ESP III, ESP I was DP&L's most recent SSO, which was reinstated by the Commission on August 26, 2016, in these proceedings. Finding and Order (Aug. 26, 2016). Accordingly, the Commission restored the provisions, terms and conditions of ESP I, as required by the plain language of the statute.

{¶ 16} Moreover, we find that OCC's statutory interpretation to be flawed. OCC claims that the enumerated provisions in R.C. 4928.143(B)(2) can be part of the ESP but are not part of the SSO. However, several of the enumerated provisions include charges that relate solely to the SSO for non-shopping customers. R.C. 4928.143(B)(2)(e) specifically authorizes "[a]utomatic increases or decreases in any component *of the standard service offer price* * * * [emphasis added]." Under OCC's flawed interpretation of the statutes, this provision, which explicitly relates to the "standard service offer price," would be part of the ESP but not part of the SSO. Further R.C. 4928.143(B)(2)(a) authorizes:

> Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied *under the offer*; the cost of purchased power supplied *under the offer*, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes * * *. (emphasis added).

The General Assembly clearly intended that the SSO may include provisions allowing for the recovery of the cost of fuel, purchased power, emission allowances and carbon or energy

taxes. These provisions would be part of the ESP, but these provisions also would be one of the "terms, conditions or provisions" of the SSO applicable to non-shopping customers. OCC's statutory interpretation is not persuasive. Rehearing on this assignment of error should be denied.

B. Second Assignment of Error

{¶ 17} In its second assignment of error, OCC argues that the Second Finding and Order was unreasonable and unlawful and harmed consumers because it failed to continue the distribution rate freeze of ESP I following DP&L's withdrawal. OCC claims that DP&L's commitment to freeze distribution rates was a provision, term or condition of the utility's most recent ESP. OCC argues that under ESP I Stipulation, DP&L agreed to freeze rates but was able to seek charges from customers for storm damage costs it incurred. OCC further claims that the Commission's failure to implement a distribution rate freeze was unreasonable in light of the Commission's ruling in the Second Finding and Order allowing DP&L to separately collect storm costs in continued rates.

{¶ 18} DP&L argues that rehearing on this assignment of error should be rejected because OCC failed to raise this issue in response to the Commission's November 27, 2019 Entry establishing a comment period regarding DP&L's proposed tariffs to implement ESP I. *City of Parma v. Pub. Util. Comm.*, 86 Ohio St. 3d 144, 148, 712 N.E.2d 724 (1999)("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred"). In addition, the Company argues that the Commission effectively modified the distribution rate freeze provision contained in the ESP I Stipulation by adopting a stipulation filed in DP&L's most recent distribution rate case, *In re The Dayton Power and Light Co.*, Case No. 15-1830-EL-AIR (*Distribution Rate Case*), Opinion and Order (Sept. 26, 2018). The stipulation approved by the Commission in the *Distribution Rate Case* provides that the Company may file a distribution rate case on or before October 31, 2022, in order to maintain its distribution investment rider; thus, according to DP&L, the stipulation establishes that DP&L has the right to file a distribution rate case.

{¶ 19} The Commission finds that rehearing on this assignment of error should be denied. In the *Distribution Rate Case,* DP&L's current distribution rates were lawfully established by the Commission pursuant to the specific requirements of Chapter 4909 of the Revised Code. Although we are not persuaded that *Parma* should apply to OCC's failure to raise this issue during the comment period established by the November 27, 2019 Entry in this case, we do find that *Parma* applies to the failure of OCC to raise this issue during the *Distribution Rate Case*. While the *Distribution Rate Case* was pending before the Commission, the provisions, terms, and conditions of ESP I were reinstated for the period between September 1, 2016, and October 31, 2017; thus, OCC should have raised this issue, or otherwise preserved its rights, in the *Distribution Rate Case*, where the distribution rates were, in fact, established according to law. It is settled law in Ohio that retroactive ratemaking is not permitted. *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). However, OCC has offered no compelling argument regarding how the Commission, after approving distribution rates in the *Distribution Rate Case*, could retroactively modify DP&L's rates to the prior levels. Thus, we find that OCC's failure to raise this issue at an earlier juncture, during the *Distribution Rate Case*, constitutes a forfeiture of the objection because it deprived the Commission of an opportunity to cure any error when it reasonably could have done so. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, at ¶ 18 (citing *Parma*, 86 Ohio St.3d at 148, 712 N.E.2d 724).

C. Third Assignment of Error

{¶ 20} OCC alleges in its third assignment of error that charging customers for storm recovery expenses incurred in 2016, 2017 and 2018, following DP&L's withdrawal of its ESP, was unlawful. In support of this assignment of error, OCC claims that the Commission's ruling that DP&L's storm recovery expenses was a provision of DP&L's most recent SSO under 4928.143(C)(2)(b) was mistaken and unsupported in violation of R.C. 4903.09. OCC reasons that the storm recovery rider authorized in ESP I allowed DP&L to collect $23.3 million in costs from customers for storms occurring prior to and during the term of ESP I,

when a rate freeze was in effect. However, OCC notes that the tariff filed by DP&L to continue ESP I rates allows DP&L to collect 2017, 2018 and 2019 storm recovery costs from customers. OCC alleges that this rider was created in DP&L's ESP III case, not in ESP I. Thus, according to OCC, the storm recovery tariff is not a condition, term, or provision of the Company's most recent ESP and should not be used to continue collecting storm recovery costs from customers.

{¶ 21} DP&L responds that the ESP I Stipulation specifically authorized a storm recovery rider. ESP I Stipulation (Feb. 24, 2009) at 10-11. The Company notes that R.C. 4928.143(C)(2)(b) provides that the provisions and terms of DP&L's prior SSO shall be implemented, so a storm recovery rider is permitted. The Company alleges that, in order to support its assignment of error, OCC reads the ESP I Stipulation to encompass a narrow recovery of storm costs incurred from 2008 through 2013, but the language of ESP I has no such time limitation, quite clearly permitting DP&L to recover "[t]he cost of storm damage." *Id.* at 11.

{¶ 22} The Commission finds that rehearing on this assignment of error should be denied. In the Second Finding and Order, the Commission noted that the ESP I Stipulation, adopted in these cases, contained a placeholder specifically permitting DP&L to seek approval of a rider to recover "the cost of storm damage." Second Finding and Order (Dec. 18, 2019) at ¶ 39; *see also* Opinion and Order (June 24, 2009) at 5-6, ESP I Stipulation at 10-11. There is no language in the ESP I Stipulation limiting the time period of storms eligible for recovery costs under the storm cost recovery rider. No party appealed the Commission's decision approving ESP I. DP&L subsequently sought, and obtained, Commission approval for a storm cost recovery rider. Therefore, we affirm that the storm cost recovery rider is a provision, term, or condition of ESP I and that eligible storm recovery costs were not limited to costs incurred during the period from 2008 through 2013. Moreover, we note that OCC's arguments lack consistency. OCC acknowledges that the storm recovery costs, which were appropriately collected, included costs "that were incurred, on or before the ESP I term." Storm recovery costs for 2016, 2017, and 2018 were, in fact, incurred prior to the

reinstatement of ESP I in the Second Finding and Order. Therefore, the Commission finds that DP&L should be permitted to continue its current storm cost recovery rider regardless of when the storm occurred.

D. Fourth Assignment of Error

{¶ 23} In its fourth assignment of error, OCC claims that the Commission unreasonably and unlawfully approved DP&L's RSC, allowing DP&L to collect funds from customers for a service that it is not providing. In support of this assignment of error, OCC notes that when the RSC was originally authorized, DP&L owned power plants that were providing power to customers. OCC acknowledges that the parties stipulated that the RSC would continue in ESP I at a rate equaling to 11 percent of DP&L's generation rate in 2004. However, OCC notes that, in DP&L's second ESP, the provider of last resort (POLR) obligations were shifted to bidders in competitive bid auctions to supply the SSO for DP&L's customers and that competitive auctions have been held to supply power through May 31, 2022. OCC argues that, when DP&L divested its power plants, DP&L stopped providing POLR service to customers. Thus, OCC concludes that the RSC should have been set to zero, consistent with the treatment of the environmental investment rider (EIR), when ESP I was reinstated.

{¶ 24} In its memorandum contra, DP&L responds that the Company still provides POLR service. DP&L notes that the Commission previously rejected this same argument when the Company withdrew from ESP II and ESP I was reinstated. Finding and Order (Aug. 26, 2016) at ¶ 23. The Company alleges that there is no guarantee that the competitive bidding auctions which supply SSO customers will continue or that any suppliers will bid; thus DP&L still bears a POLR risk that it will need to provide generation service to some or all of its customers if there are not enough bidders at auction. DP&L also posits that there is a risk that winning bidders will default on their obligation to provide generation service to SSO customers. Finally, DP&L claims that the right of shopping customers to return to the SSO imposes additional POLR risk for DP&L in the event that the SSO suppliers are unable to provide generation to returning customers.

{¶ 25} The Company also rebuts OCC claim that DP&L is no longer subject to POLR risk because it no longer owns generation assets. DP&L asserts that it has POLR risk because it has a statutory obligation to provide generation if there are no other providers, irrespective of whether it owns generation assets or not.

{¶ 26} As we discussed in the first Finding and Order in this proceeding, on December 28, 2005, the Commission modified and adopted a stipulation authorizing DP&L to split its previously approved rate stabilization surcharge into two separate components: the RSC[1] and the EIR. *In re The Dayton Power and Light Co.*, Case No. 05-276-EL-AIR (*DP&L RSP Extension Case*), Opinion and Order (Dec. 28, 2005). The RSC was authorized to compensate DP&L for its POLR obligations, while 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. The Commission determined both the RSC and EIR were fair, reasonable, and supported by the record. *DP&L RSP Extension Case*, Opinion and Order at 11. Thereafter, the Supreme Court of Ohio affirmed our decision. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007-Ohio-4276.

{¶ 27} Subsequently, on June 24, 2009, in this case, the Commission approved a stipulation establishing ESP I and continuing the RSC and EIR as terms of ESP I. Opinion and Order (June 24, 2009). The amount of the RSC was stipulated by the parties in the ESP I Stipulation. Opinion and Order at 5; ESP I Stipulation at 4. As noted above. no party appealed the Commission's decision approving ESP I. Since that time, the Commission has consistently determined that the RSC is one of the provisions, terms and conditions of ESP I. When the Commission first extended ESP I on December 19, 2012, the Commission determined that the RSC was one of the provisions, terms and conditions of ESP I, and, as

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1 Although the ESP I Stipulation characterizes this charge as the "RSS" (or rate stabilization surcharge), the signatory parties clearly intended to mean the existing RSC approved by the Commission in *DP&L RSP Extension Case,* Case No. 05-276-EL-AIR. *See Ohio Consumers' Counsel v. Pub. Util. Comm.,* 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E. 2d 269, ¶ 8, fn. 3.

such, the RSC should continue with ESP I until a subsequent SSO was authorized. Entry (Dec. 19, 2012) at 3-4. On February 19, 2012, the Commission issued the first Entry on Rehearing in these proceedings, affirming our determination that the RSC is a provision, term, or condition of ESP I. Entry on Rehearing (Feb. 19, 2013) at 4-6. *See also* Finding and Order (Aug. 26, 2016) at ¶¶ 14, 19, 23; Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 25-34. As the Supreme Court of Ohio has ruled, we should respect our precedents in order to assure the predictability which is essential in administrative law. Second Finding and Order (Dec. 18, 2019) at ¶ 29 (*citing In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 at ¶ 16 (*quoting Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)).

{¶ 28} In addition, the Commission has noted that the RSC is a non-bypassable POLR charge to allow DP&L to fulfill its POLR obligations. R.C. 4928.141 provides that the EDU must provide consumers with an SSO of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. While POLR service is currently provided by competitive bidding process auction participants, DP&L retains its obligation, over the long term, to serve as provider of last resort. Therefore, pursuant to R.C. 4928.141, DP&L maintains a long-term obligation to serve as provider of last resort, even while POLR services are being provided by competitive bidding auction participants in the short-term. We note there have been substantial disruptions in the competitive bidding auction schedules due to litigation regarding capacity auctions at the Federal Energy Regulatory Commission (FERC). *In re Ohio Edison, et al.*, Case Nos. 16-776-EL-UNC et al, Second Entry on Rehearing (Feb. 24, 2021) at ¶¶ 4-5. These disruptions are the reason that competitive auctions have not been held to supply the SSO after May 31, 2022. The litigation at FERC appears to have been resolved, although that resolution could be affected by appeals to the Federal Court of Appeals. *Id.* at ¶ 22. Therefore, we cannot find that DP&L bears zero POLR risk.

{¶ 29} Although the POLR risk is difficult to quantify, the signatory parties, including OCC, did stipulate in the ESP I Stipulation to continue the RSC at the rate previously approved in the *DP&L RSP Extension Case*. The stipulated RSC was designed to collect 11 percent of DP&L's generation rates as of January 1, 2004, which at that time was $76,250,127. *DP&L RSP Extension Case,* Opinion and Order (Dec. 28, 2005) at 3, 11; *see also Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 8, fn. 3. As we noted in the Third Entry on Rehearing in this proceeding:

> The Stipulation, which includes the RSC, was adopted by the Commission after holding a hearing and providing parties the opportunity to fully litigate this case. * * * The parties agreed that 1) the settlement was the product of serious bargaining among capable, knowledgeable parties; 2) the settlement, as a package, benefits ratepayers and the public interest; and 3) the settlement package does not violate any important regulatory principle or practice. Stipulation (Feb. 24, 2009) at 1-2. The Stipulation states, in no uncertain terms, "[t]his Stipulation contains the entire Agreement among the Signatory Parties, and embodies a complete settlement of all claims, defenses, issues and objects in these proceedings." Stipulation (Feb. 24, 2009) at 17-18. Third Entry on Rehearing at ¶ 31.

We are reluctant to disturb the stipulated rates based upon the contention of one of the signatory parties, out of many, that circumstances have changed. The stipulated rates have never been subject to reconciliation or true up to recover a fixed revenue requirement. Further, the stipulated rates for the RSC have never been adjusted, irrespective of any changes in customer usage or to reflect changes in the market in DP&L's service territory; the rates for the RSC today are exactly the same as they were when the ESP I Stipulation was adopted in 2008. We are not persuaded that the stipulated rates should be changed now.

{¶ 30} Further, we reject OCC's contention that our treatment of the RSC is inconsistent with our treatment of the EIR when DP&L terminated its second ESP. The EIR was always a bypassable, cost-based rate, 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. Once the plants were divested, the environmental controls were no longer used and useful in rendering public utility service to DP&L's non-shopping customers, and the Commission properly set the EIR to zero when DP&L returned to ESP I after the termination of its second ESP. Finding and Order, at ¶¶ 8-9, 22. On the other hand, the rates for the RSC, which is non-bypassable, were stipulated by the parties and were not based upon a specific cost incurred by the utility. Thus, there is no basis to set the RSC to zero. Accordingly rehearing on this assignment of error should be denied.

E. Fifth Assignment of Error

{¶ 31} OCC claims in its fifth assignment of error that the Commission unlawfully and unreasonably ruled that the parties were precluded from re-litigating the RSC under the doctrines of res judicata and collateral estoppel. In support of this assignment of error, OCC posits that the Commission's holding is unreasonable because the Commission can modify earlier orders so long as it explains the change and the new regulatory course is permissible. OCC claims that circumstances have changed because, since 2014, DP&L's POLR obligations have been eliminated because the POLR obligations were shifted to competitive generation providers until May 31, 2022, at the earliest.

{¶ 32} OCC also claims that the Commission ruling that the parties were precluded from relitigating the RSC under the doctrines of res judicata and collateral estoppel is unlawful because it is inconsistent with Supreme Court precedent. OCC argues that the Supreme Court of Ohio has held that res judicata in administrative proceedings should be rejected when its application would contravene and override public policy or result in manifest injustice. *Jacobs v. Teledyne,* 39 Ohio St.3d 168, 171, 529 N.E.2d 1255 (1988). OCC contends that it is not in the public interest to require customers to pay for a service they are

not receiving. Confusingly, OCC also claims that "shopping customers could be paying double for POLR service, once through the standard service offer rate paid to marketers and once through the Rate Stabilization Charge." OCC contends that the Court has held that changed circumstances that raise a new material issue or would have been relevant to resolve material issues in the earlier action will not bar ligation of the issue in the later action. In support of this claim, OCC notes that DP&L no longer owns generation and no longer provides the service that was the basis for the RSC.

{¶ 33} DP&L contends that the Commission correctly held in the Second Finding and Order that OCC is barred from relitigating the RSC by both R.C. 4903.10 and the doctrines of res judicata and collateral estoppel. DP&L notes that the Commission approved the ESP I Stipulation in this proceeding on June 24, 2009. Opinion and Order (Jun. 24, 2009) at 13. DP&L argues that, because R.C. 4928.143(C)(2)(b) was in place in 2009 when OCC signed the ESP I Stipulation, OCC was on notice that DP&L had the right to reinstate ESP I, in the event that the Commission modified and approved a subsequent ESP. DP&L further notes that no party to the ESP I case sought rehearing of the Commission's decision approving the ESP I Stipulation, and no party appealed that decision. DP&L argues that a party cannot challenge a decision if it did not seek rehearing of that decision. R.C. 4903.10(B).

{¶ 34} DP&L also contends that OCC is barred from challenging the lawfulness of the RSC by the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. * * * Where a claim *could have been litigated in the previous suit*, claim preclusion also bars subsequent actions on that matter." (Emphasis added.) *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6 (2007) (quoting *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998); *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 384, 653 N.E.2d 226 (1995). "Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same

parties or their privies. * * * Issue preclusion applies even if the causes of action differ." O'Nesti at ¶ 7 (quoting *Fort Frye*, 81 Ohio St.3d at 395). "[T]he doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Grava,* 73 Ohio St.3d at 382 (quoting *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990)). Further, "the doctrine of res judicata is applicable to defenses which, although not raised, could have been raised in the prior action." *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 246, 431 N.E.2d 672 (1982). *See also* Third Entry on Rehearing (Dec. 14, 2016) at ¶¶ 32-33. DP&L asserts that, in this proceeding, OCC had the opportunity, in 2009, to litigate whether the RSC was lawful in ESP I. Instead, OCC signed the ESP I Stipulation and agreed to the RSC, knowing that DP&L would have the right under R.C. 4928.143(C)(2)(b) to reinstate ESP I, including the RSC, if the Commission modified and approved DP&L's next ESP application. OCC is thus barred by res judicata and collateral estoppel from challenging the RSC now.

{¶ 35} We note that the fundamental issue in this assignment of error is whether OCC can relitigate the question of whether the RSC is one of the provisions, terms and conditions of ESP I. In the Second Finding and Order the Commission held that OCC cannot relitigate this issue on two separate and independent grounds. One, OCC is barred from relitigating the RSC by R.C. 4903.10. Two, OCC is barred from relitigating the RSC by res judicata and collateral estoppel. OCC has challenged the latter ruling but did not seek rehearing of the former.

1. OCC IS BARRED FROM RELITIGATING THE RSC BY R.C. 4903.10.

{¶ 36} As a preliminary matter, the Commission notes that, when the Commission first extended ESP I on December 19, 2012, the Commission determined that the RSC was one of the provisions, terms and conditions of ESP I, and, as such, the RSC should continue with ESP I until a subsequent SSO is authorized. Entry (Dec. 19, 2012) at 3-4. On February 19, 2013, the Commission issued the first Entry on Rehearing in these proceedings, affirming our determination that the RSC is a provision, term, or condition of ESP I. Entry on Rehearing (Feb. 19, 2013) at 4-6. This was a final appealable order of the Commission

because it authorized DP&L to continue to collect the RSC while the proposed ESP II was pending before the Commission; ultimately, the RSC was collected pursuant to the extension of ESP I for a full year, from January 1, 2013 to December 31, 2013. *See ESP II Case*, Entry (Dec. 13, 2013). No party, including OCC, appealed this ruling by the Commission. Thus, after the deadline for filing an appeal passed, the December 19, 2012 Entry was a final, non-appealable order of the Commission. The failure to appeal the December 19, 2012 Entry precludes any challenge to the ruling in the December 19, 2012 Entry at this time. *See also* Finding and Order at ¶ 23. Thus, OCC's claim, that it can relitigate the question of whether the RSC is one of the provisions, terms and conditions of ESP I is untimely and barred by R.C. 4903.10.

{¶ 37} Further, the Commission notes that, in the Second Finding and Order, we specifically ruled that: (1) the Commission had determined that the RSC is one of the provisions, terms, and conditions of ESP I in the December 19, 2012 Entry; (2) the December 19, 2012 Entry was a final, non-appealable order; and (3) any challenge to the December 19, 2012 Entry is untimely and barred by 4903.10. Second Finding and Order at ¶ 31. In its application for rehearing filed on January 17, 2020, OCC did not seek rehearing on this ruling contained in the Second Finding and Order. Therefore, OCC is barred from challenging this ruling, irrespective of the Commission's separate and independent determination that OCC's claim is also barred by res judicata and collateral estoppel.

2. OCC'S CLAIM IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

{¶ 38} Res judicata and collateral estoppel "operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *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)). "Collateral estoppel may be applied in a civil action to bar the relitigation of an issue already determined by an administrative agency and left unchallenged if the administrative proceeding was judicial in nature and if the parties had an adequate opportunity to litigate their versions of the disputed facts and seek review of any adverse findings." Third Entry

on Rehearing at ¶ 33 (*quoting Tedesco v. Glenbeigh Hosp. of Cleveland, Inc*. (Mar. 16, 1989), Cuyahoga App. No. 54899, 1989 WL 24908). "The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Grava*, 73 Ohio St.3d at, 382, 653 N.E.2d 226 ; . *see also O'Nesti*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803.

{¶ 39} In this case, the question of whether the RSC is one of the provisions, terms and conditions of ESP I was necessarily determined by the Commission in the December 19, 2012 Entry. The December 19, 2012 Entry addressed motions regarding this issue filed by both DP&L and by certain intervenors, including OCC. Memoranda contra and replies were filed addressing both motions. Thus, the administrative proceeding was judicial in nature and all parties had an opportunity to litigate the issue. Further, the parties had an opportunity to seek review of an adverse ruling. OCC and other intervenors filed applications for rehearing regarding the December 19, 2012 Entry. The Commission fully addressed those applications for rehearing in the first Entry on Rehearing in this case. Entry on Rehearing (Feb. 19, 2013) at 4-6. OCC had 60 days to file an appeal after the Commission issued the first Entry on Rehearing. R.C. 4903.11. OCC did not file an appeal. Thus, res judicata and collateral estoppel preclude OCC from relitigating the question of whether the RSC is a provision, term or condition of ESP I.

{¶ 40} We reject OCC's claims that the Commission's determination that res judicata and collateral estoppel preclude OCC from relitigating the RSC presents a manifest injustice or contravenes public policy. Likewise, we are not persuaded by OCC's argument that changed circumstances necessitate that res judicata and collateral estoppel should not apply. In support of these arguments, OCC cites to one fact, that DP&L has divested its generation assets. OCC presents this fact alone with no other context or supporting facts. As we stated above, DP&L retains a long-term POLR obligation under R.C. 4928.141, and we are not persuaded that the Company's POLR risk is zero. Moreover, the rate of the RSC is not cost-based but was stipulated by the parties to the ESP I Stipulation, including OCC. The stipulated rates for the RSC have never been adjusted or modified, irrespective of any

changes in customer usage or to reflect changes in the market in DP&L's service territory. OCC cites to no evidence that DP&L has been over-compensated or under-compensated for its POLR risk by the RSC. As stated above, we are reluctant to disturb a stipulated rate on the basis that one of the signatory parties now believes that changed circumstances dictate a new rate.

{¶ 41} OCC further alleges that the Commission's ruling in the Second Finding and Order is unreasonable because, although *the parties* were precluded from re-litigating the RSC by res judicata and collateral estoppel, *the Commission* can modify earlier orders so long as the Commission explains the change and the new regulatory course is permissible. We are not persuaded by OCC's claim. The Commission should respect our precedents in order to assure the predictability which is essential in administrative law. *Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, at ¶ 16 (*quoting Cleveland Elec. Illum. Co.*, 42 Ohio St.2d at 431, 330 N.E.2d 1). This does not mean, however, that the Commission may never revisit a particular decision, only that if the Commission does change course, it must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio 1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. However, the sole party seeking the Commission to change course at this point in the proceedings is OCC, and OCC is barred from re-litigating the RSC by res judicata and collateral estoppel. It would be disingenuous for the Commission, as requested by OCC, to modify our prior order to eliminate the RSC based upon arguments which we have found that OCC itself is barred from raising.

F. Sixth Assignment of Error

{¶ 42} In its sixth and final assignment of error, OCC claims that allowing DP&L's revised tariffs to be effective upon filing, before the Commission conducted a review and without making the tariffs subject to refund, was unreasonable and harmed customers.

{¶ 43} DP&L responds, initially, that the Commission is required to implement the "provisions, terms and conditions" of ESP I (R.C. 4928.143(C)(2)(b)), and since the RSC was

not subject to refund under ESP I, it cannot be subject to refund now. Further, the Company claims that refunds are barred by long-standing precedent by the Supreme Court. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.,* 166 Ohio St. 254, 141 N.E.2d 465 (1957), syllabus, ¶ 2. Moreover, the Company argues that a refund would violate the well-settled principle that "retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme." *Lucas Cty. Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997). Further, the Company contends that the no-refund rule and the no-retroactive-ratemaking rule strike a reasonable balance between the interests of the utility and its customers. The no-retroactive-ratemaking rule prevents the utility from recovering increased costs incurred while a case is pending before the Commission, while the no-refund rule prevents customers from recovering increased costs authorized by a Commission order. There is a rational balance between those two rules, with which the Commission should not interfere.

{¶ 44} For the reasons set forth below, rehearing on this assignment of error should be granted.

1. THE COMMISSION PROPERLY ADOPTED DP&L'S PROPOSED TARIFFS.

{¶ 45} As a preliminary matter, OCC's claim that the Commission erred by adopting the proposed tariffs without a prior review should be rejected. DP&L had withdrawn from ESP III and was returning to ESP I as directed by the statute. Time was of the essence. It is not unusual for the Commission, when time is of the essence, to order that revisions to proposed tariffs be filed as final tariffs, subject to final Commission review.

{¶ 46} In this case, DP&L filed proposed tariffs to return to ESP I. The Commission ordered modifications to those tariffs, including removal of certain riders. The Commission also directed DP&L to file revised tariffs in final form "subject to final review by the Commission." Second Finding and Order at ¶ 46. No further revisions to the tariffs were deemed necessary after the final tariffs were filed. No Staff recommendation was filed because none was necessary.

2. THE COMMISSION DOES NOT HAVE THE DISCRETION TO MAKE RATES AND CHARGES SUBJECT TO REFUND.

{¶ 47} In support of this assignment of error, OCC claims that the Commission has the authority to make rates subject to refund, noting previous cases where the Commission has made collections of a rate or charge subject to refund in order to explore the reasonableness of the rates in light of events that occurred after the issuance of the Commission order approving the rate. Thus, OCC argues that the Commission has the discretion to order rates collected from customers to be refundable.

{¶ 48} The Company responds that OCC's reliance on the previous cases is flawed. DP&L contends that, in one case, the utility consented to making the rates subject to refund. *In re Ohio Power Co. and Columbus S. Power Co.,* Case No. 10-2929-EL-UNC, Entry (May 18, 2016). In two other cases, the applicable law was changed *after* the Commission had decided the case.

{¶ 49} We note that, over 60 years ago, the Supreme Court of Ohio ruled that under Ohio's statute, R.C. 4905.32, "a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* , 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). Subsequently, in 1982, the Court recognized an exception to *Keco* decision. *River Gas Co. v. Pub. Util. Comm.,* 69 Ohio St.2d 509, 433 N.E.2d 568 (1982). In *River Gas,* the Court explained that the rate in *River Gas* did not involve the statutory ratemaking process involved in establishing fixed rate schedules but involved variable rate schedules for fuel cost adjustment, under which rates "varied without prior approval of the Commission, and independently from the formal rate-making process." Thus, the Court concluded that the rate in *River Gas* did not constitute "rate-making in its usual and customary sense." *Id.* The Court explained that *Keco* involved a situation where a consumer sued for restitution for amounts collected under a Commission-approved tariff later found to be unreasonable; whereas in *River Gas,* the Commission found that, in calculating costs that may be recovered

prospectively from customers, it was appropriate for certain refunds to be deducted from the costs. *River Gas* at 513-514.

{¶ 50} OCC does not identify any statutory authority vesting the Commission with the discretion to make rates and charges subject to refund. It is well established that the Commission is a creature of statute and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm.,* 85 Ohio St.3d 87,88, 706 N.E.2d 1255 (1999). Further, OCC does not cite to a single Supreme Court ruling that the Commission has discretion to make rates and charges subject to refund. In fact, OCC's sole mention of *Keco* is to cite to a separate opinion by Justice Pfeifer calling upon *the Supreme Court of Ohio* to overrule *Keco*. *In re Application of Columbus S. Power Co.,* 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶¶ 61-67 (Pfeifer, J., dissenting). The Commission is mindful of the potential unfairness when rates and charges are deemed unlawful but there is no refund of the rates and charges which have been collected from ratepayers. However, we are not the Supreme Court of Ohio, and we have no authority to overrule *Keco*. In fact, in the sole case cited by OCC, the Court affirmed that the only remedy to the no-refund rule in *Keco* is a stay under R.C. R.C. 4903.16. *Columbus S. Power,* 2014-Ohio-462 at ¶¶ 56-57 (*quoting Columbus S. Power,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 17).

{¶ 51} Moreover, the cases cited by OCC, where the Commission ordered that certain rates be made subject to refund, are simply not analogous to this case. In each of these cases, the Commission directed that the rates and charges be collected subject to refund *after* the rate or charge had been declared unlawful and remanded to the Commission, or the underlying law which authorized the rate or charge had been modified or amended *after* the Commission had approved the rate or charge. For example, in *In re Ohio Power Co. and Columbus S. Power Co.,* the Supreme Court had reversed the Commission and remanded the case to the Commission for further proceedings. *In re Ohio Power Co. and Columbus S. Power Co.,* Case No. 10-2929-EL-UNC, Entry (May 18, 2016) at ¶ 6. After the remand, the Commission directed that future collections of the rate stability rider be collected subject to refund because the rate stability rider already had been ruled unlawful

by the Court. *Id.* at ¶¶ 1, 9, 11. Remand proceedings before the Commission can take time to resolve and that case was no exception; the case was ultimately resolved on February 23, 2017, when the Commission adopted a global stipulation which resolved the remand as well as several other cases. *In re Ohio Power Co. and Columbus S. Power Co.*, Order on Global Settlement Stipulation (Feb. 23, 2017). In the instant proceeding, on the other hand, the Supreme Court has not deemed the RSC unlawful nor has there been either a change in underlying law or a directive by the General Assembly to refund previously collected rates.

{¶ 52} We find that the Commission has no statutory authority to make rates and charges subject to refund at our discretion. The Court has consistently ruled that "[n]either the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco* * * *." *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829 at ¶ 27; see also *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶ 16 (citing *Green Cove*, 2004-Ohio-4774 at ¶ 27; *see also In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, *. N.E.3d 863 at ¶ 49; *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, 140 Ohio St.3d 352, 2014-Ohio-3764, 18 N.E.3d 1157 at ¶ 28. The Commission is bound to follow these decisions by the Supreme Court of Ohio.

{¶ 53} Nonetheless, as noted above, the Supreme Court has recognized an exception to *Keco*: refunds may be ordered if two independent conditions are both met. First, the tariff provision for the rate or charge must be reconcilable. In other words, the rate or charge must be subject to future adjustments which are implemented without prior Commission review and approval and be subject to true up and reconciliation. Thus, when the Commission established the rate or charge, the Commission must not have engaged in "rate-making in its usual and customary sense" in approving the rate or charge. *River Gas Co.*, at 513. The Court has explained that traditional ratemaking includes three steps: an application before the Commission, preapproval by the Commission, and the filing of the rate with the Commission prior to the collection of the rate. *River Gas* at 512-513. Moreover, reconcilable rates and charges (sometimes referred to as rate adjustment clauses) must be

authorized by statute. *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 429 N.E.2d 444 (1981).

{¶ 54} The second independent condition requires that the tariff contain language providing for refunds. If the tariff does not contain language providing for refunds, refunds cannot be ordered by the Commission. *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, 2018-Ohio-229, 106 N.E.3d 1 (*FirstEnergy AER Case*) at ¶ 19; *see also FirstEnergy AER Case* at ¶¶ 66-67 (Kennedy, J., concurring) ("[b]ecause the tariff at issue here did not specify a refund, the commission's order of a refund of REC costs was unlawful retroactive ratemaking."). In the subsequent appeal regarding FirstEnergy's distribution modernization rider, the Court relied upon the lead opinion in the *FirstEnergy AER Case,* holding that R.C. 4905.32 bars any refund of recovered rates unless the tariff applicable to those rates sets forth a refund mechanism. *In re Application of Ohio Edison Co.,* 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 (*FirstEnergy ESP IV Case*) at ¶ 23 (citing *FirstEnergy AER Case* at ¶¶ 15-20). We note that, once the Court determined that FirstEnergy's tariffs for the distribution modernization rider did not include a provision for refunds, it was unnecessary for the Court to reach a decision whether the *River Gas* exception to *Keco* applied in the *FirstEnergy ESP IV Case*. The Court does not issue advisory rulings. *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982).

{¶ 55} OCC does not address this entire line of cases, but the Commission cannot simply ignore adverse precedent. There is nothing in the *FirstEnergy ESP IV Case* to support OCC's claim that the Commission has the discretion to make riders subject to refund or that *Keco* and its progeny can simply be ignored.

3. THE RATE STABILIZATION CHARGE DOES NOT MEET THE CONDITIONS SET FORTH IN RIVER GAS.

{¶ 56} While the Commission lacks the discretion to make the RSC subject to refund, *River Gas* does provide an exception to *Keco* if the rate or charge is subject to future adjustments which are implemented without prior Commission review and approval and

subject to true up and reconciliation. In other words, the Commission did not engage in "rate-making in its usual and customary sense" when the rate or charged was established. The Court has explained that traditional ratemaking includes three steps: (1) an application before the Commission, (2) preapproval by the Commission, and (3) the filing of the rate with the Commission prior to the collection of the rate. *River Gas* at 512-513. However, all three of the steps of traditional ratemaking are present with respect to the RSC.

{¶ 57} The RSC was requested pursuant to an application filed before the Commission in this docket on October 10, 2008. Application (Oct. 10, 2008). DP&L proposed that the SSO be the same as the rate stabilization plan approved by the Commission in *In re Dayton Power and Light Co.*, 05-276-EL-AIR, Opinion and Order (Dec. 28, 2005), which was affirmed by the Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269. This rate stabilization plan, which was incorporated into the application, included the RSC. *See Ohio Consumers' Counsel,* 2007-Ohio-4276 at ¶ 8, fn 3.

{¶ 58} Moreover, the RSC was preapproved by the Commission. The Commission adopted the ESP I Stipulation submitted by the parties. Opinion and Order (June 24, 2009). The Commission specifically noted that the RSC would continue in the Opinion and Order and approved the proposed tariffs filed on February 24, 2009. *Id.* at 5, 11.

{¶ 59} Finally, the rate of the RSC was filed with the Commission prior to the collection of the rate. As noted above, in the Opinion and Order, the Commission approved the proposed tariffs, including the RSC, which were filed on February 24, 2009. *Id.* Subsequently, revised tariffs were filed on June 29, 2009, with an effective date of June 30, 2009. These revised tariffs included the rates for the RSC. Tariff Filing (Jun. 29, 2009). These rates for the RSC have remained unchanged each time ESP I has been reinstated. Tariff Filing (Sep. 1, 2016); Tariff Filing (Dec. 19, 2019).

{¶ 60} The Commission finds that, as all three steps of traditional rate-making set forth in *River Gas* have been met with respect to the RSC, the Commission engaged in rate-

making in its usual and customary sense in establishing the RSC. Accordingly, we find that the *River Gas* exception to *Keco* does not apply with respect to the RSC, and the RSC should not be refundable.

4. THE RATE STABILIZATION CHARGE SHOULD BE MADE REFUNDABLE TO THE EXTENT PERMITTED BY LAW.

{¶ 61} As stated above, the Commission is mindful of the potential unfairness when rates and charges are deemed unlawful, but there is no refund of the rates and charges which have been collected from ratepayers. We also note the extraordinary circumstances that the procedural history of this case presents. We agree with DP&L that, when the parties agreed to the ESP I Stipulation, the parties knew, or should have known, that ESP I could be reinstated pursuant to R.C. 4928.143(C)(2)(b) if the Commission modified and approved a subsequent application for an ESP and DP&L withdrew that application. However, the turn of events surrounding ESP I is nothing short of extraordinary. The Commission extended ESP I in the December 19, 2012 Entry while ESP II was pending before the Commission. After the Commission approved ESP II, the Supreme Court ruled that ESP II should be reversed, leading to the subsequent modification of ESP II by the Commission, DP&L's withdrawal of ESP II, and the first reinstatement of ESP I. After the Commission adopted ESP III, the Supreme Court dismissed as moot the appeals of the decision to reinstate ESP I. The Commission subsequently modified ESP III, based upon the Supreme Court's decision in the *FirstEnergy ESP IV Case*, leading to DP&L's withdrawal of ESP III and the second reinstatement of ESP I. We note that the continuing value of ESP I to ratepayers has been demonstrated in *In re The Dayton Power and Light Co.*, Case Nos. 18-1875-EL-RDR et al. (*Quadrennial Review Case*), which was decided contemporaneously with the decision in this proceeding. However, all of these events have contributed to the extraordinary circumstances surrounding ESP I.

{¶ 62} We note in particular the Supreme Court's decision to dismiss the appeals of our decision to reinstate the provisions of ESP I in the August 26, 2016 Finding and Order. *Dayton Power & Light Co.*, 154 Ohio St.3d 237, 2018-Ohio-4009, 113 N.E.3d 507. The Court

had no reason to believe that this question, whether the RSC is one of the provisions, terms and conditions of ESP I, would be raised again as the Commission had approved a third ESP for DP&L; but events have demonstrated that, although OCC's appeal of the decision to reinstate ESP I was moot, the question is capable of repetition yet evading review.

{¶ 63} OCC believes that we have the discretion to make the RSC refundable. As set forth in detail above, we disagree. OCC's claim has no basis in law. We also have determined above that the RSC is not a reconcilable rider pursuant to *River Gas* which may be subject to refund under the established exception to *Keco*. However, if we do not direct the Company to include a provision for refunds in the tariffs for the RSC, OCC may not be able to effectively appeal our rulings that we lack the discretion to make the RSC refundable and that the RSC is not subject to the *River Gas* exception to *Keco*. The absence of language providing for refunds may be sufficient to decide the appeal. The Court would have no need to reach the question of whether the Commission has the discretion to make the RSC refundable or whether the RSC is subject to *River Gas*. As noted above, the Court does not issue advisory rulings. *Armco,* 69 Ohio St.2d at 406.

{¶ 64} We do not seek to evade Supreme Court review of our decisions. Therefore, in light of the extraordinary circumstances in this case, the Commission will grant rehearing on OCC's sixth assignment or error. In fashioning tariff language, we are mindful of our rulings in this case. Therefore, we will direct the Company to file new proposed tariffs providing that the RSC shall be refundable "to the extent permitted by law." This language should allow OCC to effectively appeal our decisions in this case without undermining our rulings. We note that our decision is limited to the extraordinary circumstances of this case, including the fact that previous appeals of a decision to reinstate the RSC were dismissed as moot.

G. Remaining Applications for Rehearing

{¶ 65} Contemporaneous with the issuance of this Fifth Entry on Rehearing, the Commission issued the Opinion and Order in *the Quadrennial Review Case*. In the Opinion

and Order in the *Quadrennial Review Case,* the Commission adopted a global stipulation resolving the quadrennial review of ESP I mandated by R.C. 4928.143, as well as DP&L's grid modernization proposal, and DP&L's significantly excessive earnings test cases for 2018 and 2019.

{¶ 66} Among other terms of the global stipulation filed on October 23, 2020, the signatory parties, including IEU-Ohio, IGS, Dayton, Honda, Ohio Manufacturers' Association Energy Group and Kroger requested that the Commission defer ruling on the applications for rehearing filed in response to the Second Finding and Order in this proceeding. The signatory parties further represent that the applications for rehearing filed by IEU-Ohio, IGS and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger will be withdrawn if the Commission issues a final appeal order which adopts, without modification, the global stipulation submitted in the *Quadrennial Review Case.*

{¶ 67} The Opinion and Order in the *Quadrennial Review Case* adopted, without modification, the global stipulation filed in that proceeding. Accordingly, to the extent necessary, the Commission will address the applications for rehearing filed by IEU-Ohio and Dayton/Honda and the joint application for rehearing filed by OMA and Kroger by subsequent entry.

IV. ORDER

{¶ 68} It is, therefore,

{¶ 69} ORDERED, That the applications for rehearing filed by OCC be granted, in part, and denied, in part. It is, further,

{¶ 70} ORDERED, That a copy of this Fifth Entry on Rehearing be served upon each party of record.

COMMISSIONERS:
Approving:
Jenifer French, Chair
M. Beth Trombold
Daniel R. Conway
Dennis P. Deters
Recusal:
Lawrence K. Friedeman

GAP/hac

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

Summary: Entry on Rehearing granting, in part, and denying, in part, the application for rehearing filed by the Ohio Consumers' Counsel. electronically filed by Ms. Mary E Fischer on behalf of Public Utilities Commission of Ohio