

IN THE SUPREME COURT OF OHIO

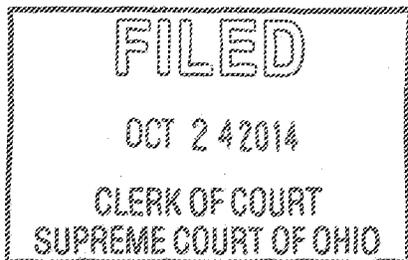
ORIGINAL

In the Matter of the Application of : Case No. 14-1505
The Dayton Power and Light Company for :
Approval of Its Electric Security Plan, etc. : Appeal from the Public Utilities
 : Commission of Ohio
 :
 : Public Utilities Commission of Ohio
 : Case Nos. 12-426-EL-SSO,
 : 12-427-EL-ATA,
 : 12-428-EL-AAM,
 : 12-429-EL-WVR, and
 : 12-672-EL-RDR
 :

**THE DAYTON POWER AND LIGHT COMPANY'S MEMORANDUM IN
OPPOSITION TO MOTION FOR A STAY BY INDUSTRIAL ENERGY USERS-
OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION AND SUMMARY

Appellants have filed a motion that is largely "fact-free." However, the Public Utilities Commission of Ohio ("PUCO") authorized The Dayton Power and Light Company ("DP&L") to collect the Service Stability Rider ("SSR") as part of the utility's Electric Security Plan ("ESP"). Sept. 4, 2013 Opinion and Order ("ESP Order"), pp. 21-22. The PUCO found that "the SSR is the *minimum amount necessary* to maintain [DP&L's] financial integrity" and, thereby, its ability to provide "stable, reliable, [and] safe retail electric service." *Id.* at 22 (emphasis added).

Throughout the rehearing process, the PUCO affirmed the legality of, and factual support for, the SSR and moreover, refused to stay the SSR as requested by various parties, including Appellants Industrial Energy Users-Ohio ("IEU") and The Office of the Ohio

Consumers' Counsel ("OCC"). Mar. 19, 2014 Second Entry on Rehearing, pp. 2-12; June 4, 2014 Fourth Entry on Rehearing, pp. 9-11; Oct. 1, 2014 Entry, p. 6. The PUCO found that the parties challenging the SSR were unlikely to prevail on appeal, and that they had failed to demonstrate "that they would suffer irreparable harm absent the stay, that DP&L would not be substantially harmed as a result of the stay, or that a stay is in the public interest." Oct. 1, 2014 Entry, p. 6. Despite those factual findings – to which this Court defers under the well-settled standard of review used by this Court on review of PUCO rulings – Appellants ask this Court to stay DP&L's collection of the SSR while this appeal is pending. This Court should reject the Joint Motion for three separate and independent reasons.

First, even if Appellants were entitled to a stay, then they should post a bond as required by R.C. 4903.16. Appellants have repeatedly argued that they should be permitted to obtain a stay under R.C. 4903.16 without posting a bond as required by the statute. This Court has repeatedly rejected that argument. Indeed, just two days ago, the Court denied a motion to stay a rider remarkably similar to the rider at issue here in another utility case based on the failure of the movants to post a bond. *In re Columbus S. Power Co.*, Case No. 2013-0521 (Entry Oct. 22, 2014).

Second, Appellants have not satisfied the conditions for a stay. Appellants have not demonstrated a strong likelihood of success on the merits because they have failed to show that the factual findings of the PUCO (that the SSR satisfies the elements of R.C. 4928.143(B)(2)(d)) lack factual support. They also have failed to show that the SSR is barred by any other statute. Further, Appellants have not shown that the SSR would irreparably harm DP&L's customers or be contrary to the public interest. Indeed, the PUCO found that without the SSR, DP&L's financial integrity would be impaired, and that DP&L would not be able to

provide stable, safe, and reliable service. ESP Order, pp. 21-22. In addition, the PUCO found that without the SSR, DP&L's ability to comply with its statutory obligation to divest its generation assets would also be compromised. June 4, 2014 Fourth Entry on Rehearing, p. 5 (relying on DP&L testimony that even with the SSR, "due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds" that "significantly impede upon [DP&L's] ability to transfer its generation assets" before 2017). Thus, staying the SSR would substantially harm not only DP&L, but also its customers, and would be contrary to the public interest.

Third, a partial stay of the ESP Order – as Appellants propose – is neither contemplated by R.C. 4903.16 nor appropriate given the complexities of DP&L's ESP. Section 4903.16 allows parties to apply to "stay execution" of "a final order rendered by the public utilities commission." The statute does not provide for a partial stay of a PUCO order. Further, although the SSR provides DP&L with critical revenue, other features of the ESP subject the utility to costly burdens, such as the competitive bidding process. ESP Order, pp. 12-17. The PUCO imposed those obligations assuming that the SSR would offset their costs and maintain DP&L's financial integrity. *Id.* at 21. Removing the SSR, while leaving those burdens in place would destroy the balance struck by the PUCO.

II. STATEMENT OF FACTS

The Joint Motion does not include a statement of facts, as ordinarily appears in papers filed in this Court. Appellants' omission is particularly striking, given numerous factual findings by the PUCO that are pertinent to their requested stay, as well as this Court's highly-deferential standard for reviewing such findings by the PUCO. *Consumers' Counsel v. Pub. Util.*

Comm., 4 Ohio St.3d 111, 112, 447 N.E.2d 749 (1983) (per curiam) ("As to questions of fact, this court has repeatedly enunciated the rule that orders of the [PUCO] will not be reversed unless they are manifestly against the weight of the evidence or are so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.") (internal quotation marks and citation omitted). DP&L remedies the Joint Motion's deficiency by providing the following statement of facts.

DP&L initiated the proceedings below to obtain approval of a Standard Service Offer ("SSO") under R.C. 4928.141(A). SSO service is the generation service that a customer receives from its electric utility if the customer has not elected to switch to a competitive provider of generation. R.C. 4928.141(A) requires electric distribution utilities to establish an SSO through either a Market Rate Offer ("MRO") under R.C. 4928.142 or an ESP under R.C. 4928.143. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 4. DP&L requested approval of an ESP. Dec. 12, 2012 Second Revised Application of The Dayton Power and Light Company for Approval of an Electric Security Plan.

In its ESP application, DP&L sought to implement a nonbypassable charge known as the SSR. *Id.* at 2. DP&L proposed the SSR to maintain its financial integrity, which has been challenged in recent years by declining wholesale prices and declining capacity prices. Second Revised Direct Testimony of Craig L. Jackson, p. 13 & Second Revised Exhibit CLJ-1 (C. Jackson); Tr. 135-36 (C. Jackson). DP&L demonstrated that if its return on equity were to decline, then its ability to provide stable, reliable, and safe service would be jeopardized. Specifically, as DP&L's Chief Financial Officer testified:

"Q. On Pages 10 and following in Witness Jonathan Lessers' Direct Testimony, he discusses the Company's proposed SSR and on Page 11 indicates that 'If a company is told its financial integrity is guaranteed, then the economic incentive to improve its operations and reduce costs is reduced.' Please comment on his assertion and the SSR.

A. . . . I strongly disagree that the SSR requested in this proceeding will 'guarantee' the financial integrity of the Company. Instead, *it is the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity.*"

DP&L Ex. 16A, pp. 7-8 (Jackson Rebuttal) (emphasis added). Similarly, DP&L's Director of Regulatory Operations testified:

"Q. Is the SSR a charge that would have the effect of stabilizing or providing certainty regarding retail electric service?

A. Yes it is. It would stabilize retail electric service provided by DP&L because it would help to assure DP&L's financial integrity, which is *important to the company's ability to provide stable, safe, and reliable electric service*. It would provide certainty regarding retail electric service because it would help to strengthen DP&L's financial integrity, and because the SSR is important to allowing a multi-year ESP, which itself provides certainty regarding retail electric service."

DP&L Ex. 12, p. 23 (Rebuttal Testimony of Seger-Lawson) (emphasis added). In addition, DP&L's financial expert, Dr. William Chambers, explained:

"Q. Will the SSR have the effect of stabilizing and providing certainty regarding retail electric service?

A. Yes. The SSR will provide DP&L with a relatively stable element in its revenue mix. As discussed above, it is an important factor in maintaining the Company's financial integrity and thus *permits it to provide quality service to its customers*. Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially,

imperiling its ability to provide such quality service to its customers."

DP&L Ex. 4A, p. 54 (Chambers Second Revised Direct Testimony) (emphasis added).¹

DP&L sought approval of the SSR under R.C. 4928.143(B), which provides in pertinent part:

"Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code . . .

(2) [an electric security] plan may provide for or include, without limitation . . .

(d) [t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service."

R.C. 4928.143(B)(2)(d).

Following a three-week evidentiary hearing, the PUCO modified and approved DP&L's proposed SSR. ESP Order, pp. 21-22. The PUCO found that the SSR met the criteria of Section 4928.143(B)(2)(d), "as it is a charge related to default service and bypassability that has the effect of stabilizing and providing certainty regarding retail electric service." *Id.* at 21. The PUCO further found that "the SSR would have the effect of stabilizing or providing certainty regarding retail electric service" and agreed with DP&L "that if [DP&L's] financial

¹ This excerpt of the Second Revised Direct Testimony of William J. Chambers was treated confidentially before the PUCO. DP&L does not waive the confidentiality of the remaining redacted portions of his testimony

integrity becomes further compromised, it may not be able to provide stable or certain retail electric service." *Id.*

In addition, the PUCO found:

"Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, *adversely affecting its ability to provide stable, reliable, or safe retail electric service.* The Commission finds that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity."

Id. at 22 (emphasis added). The PUCO authorized the SSR at a rate of \$110 million per year, running through December 31, 2016. Sept. 6, 2013 Entry Nunc Pro Tunc, p. 2.

Along with authorizing the SSR, the PUCO also ordered DP&L to divest its generation assets. ESP Order, p. 16. In an entry on rehearing, the PUCO noted that "there are terms and conditions in certain bonds that significantly impede upon its ability to transfer its generation assets to an affiliate before September 1, 2016, and, due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds before 2017." June 4, 2014 Fourth Entry on Rehearing, p. 5. Thus, the PUCO required DP&L to divest its generation assets by January 1, 2017, the date on which the SSR expires. *Id.*

Following the PUCO's final entry on rehearing, Appellants and other parties moved to stay the SSR during the pendency of this appeal. July 30, 2014 Joint Motion for a Stay to Prevent DP&L From Charging Customers the Service Stability Rider While Appeals Are Pending or, in the Alternative, Motion to Make DP&L's Rates for Charging the Service Stability Rider Costs to Customers Subject to Refund Pending the Outcome of Rehearing and any

Appeals. The PUCO denied the stay, finding that the parties challenging the SSR were unlikely to prevail on appeal, and that they had failed to demonstrate "that they would suffer irreparable harm absent the stay, that DP&L would not be substantially harmed as a result of the stay, or that a stay is in the public interest." Oct. 1, 2014 Entry, p. 6. The Joint Motion before this Court followed.

III. THE COURT SHOULD DENY THE JOINT MOTION UNLESS APPELLANTS POST A BOND OF AT LEAST \$165 MILLION

Appellants have repeatedly argued that they should be permitted to receive a stay without posting a bond, and this Court has repeatedly rejected that argument. *In re Duke Energy Ohio, Inc.*, 139 Ohio St.3d 1490, 2014-Ohio-3298, 12 N.E.3d 1234, ¶ 1 (O'Donnell, J., separately concurring) ("R.C. 4903.16 mandates that the court set a bond when granting a stay of a final order rendered by the Public Utilities Commission"); *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 20 (requiring post of a bond and stating that R.C. 4903.16 "is clear, and it clearly applies"); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157 (1991) (stating that R.C. 4903.16 requires the appellant to post a bond to receive a stay); *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959), paragraph four of the syllabus (stating "any stay of execution of such order is conditioned upon the execution of an undertaking by the appellant").

Despite Appellants' obligation "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel" (Prof.Cond.R. 3.3(a)(2) (emphasis omitted)), Appellants fail to mention the prior holdings of this Court in arguing that this Court should disregard the plain language of R.C. 4903.16.

A. This Court Recently Upheld the Bond Requirement in a Strikingly Similar Case

Just two days ago, this Court denied a motion by IEU, OCC, and The Kroger Company to stay a remarkably similar charge to the SSR. *In re Columbus S. Power Co. ("AEP ESP Case")*, Case No. 2013-0521 (Entry, Oct. 22, 2014). The motion for stay in the *AEP ESP Case* is indistinguishable from the Joint Motion in this case.

In the *AEP ESP Case*, IEU, OCC, and Kroger have challenged the so-called Retail Stability Rider ("RSR"), which the PUCO authorized AEP Ohio to collect under R.C. 4928.143(B)(2)(d) as part of the utility's ESP, finding that the charge "promotes stable retail electric service prices and ensures customer certainty regarding retail electric service." *In re Columbus S. Power Co.*, Pub. Util. Comm. Case Nos. 11-346-EL-SSO, *et al.* (Opinion and Order, Aug. 8, 2012), p. 31.

On appeal, IEU, OCC, and Kroger recently moved to stay the RSR without posting a bond under R.C. 4903.16. As in this case, they argued that (1) the bond requirement was unconstitutional under separation-of-powers principles; (2) the public-office exemption to the bond requirement of R.C. 2505.12 applies to OCC; and (3) if a bond is required, it should be nominal. *Compare* Oct. 14, 2014 Joint Motion, pp. 5-15 *with* Aug. 5, 2014 Joint Motion for a Stay by Industrial Energy Users-Ohio, The Kroger Company, and The Office of the Ohio Consumers' Counsel, *AEP ESP Case*, pp. 2-11 (presenting identical arguments).

On October 22, 2104, this Court denied the motion for stay "for failure to comply with the bond requirement set forth in R.C. 4903.16. *10/22/2014 Case Announcements*, 2014-Ohio-4629, p. 3 (citing *In re Duke Energy Ohio, Inc.*, 139 Ohio St.3d 1490, 2014-Ohio-3298, 12 N.E.3d 1234). The charge at issue here, as in the *AEP ESP Case*, is a stability charge that the

Commission approved pursuant to R.C. 4928.143(B)(2)(d). IEU and OCC have relied on identical arguments here, and the Court should deny the Joint Motion for the same reason.

B. The Bond Requirement is Constitutional, Reasonable, and Applicable

1. The Bond Requirement is Constitutional

Statutes enacted by the Ohio General Assembly are presumed to be constitutional. *Ohio Pub. Interest Action Grp., Inc. v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 183, 331 N.E.2d 730 (1975) ("***The question of the constitutionality of every law being first determined by the Legislature, every presumption is in favor of its constitutionality.") (omission of text in original) (internal quotation marks and citation omitted). *Accord: Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12 ("We first recognize that statutes are presumed to be constitutional and that courts have a duty to liberally construe statutes in order to save them from constitutional infirmities."); *Desenco, Inc. v. City of Akron*, 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999) ("When reviewing the constitutionality of legislation, this court must presume the statutes to be constitutional."). Therefore, this Court should presume that R.C. 4903.16 is constitutional and decline Appellants' invitation to invalidate the statute.

Moreover, the Ohio Constitution provides that this Court shall have "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law.*" Article IV, Section 2(B)(2)(d), Ohio Constitution (emphasis added). Therefore, it is the General Assembly's "prerogative . . . to establish the bounds and rules of public-utility regulation." *In re Columbus S. Power*, 2011-Ohio-1788, at ¶ 19. Thus, any general (*i.e., non-PUCO-related*) caselaw providing that the General Assembly cannot circumscribe the

power of this Court to issue stays (*see* Joint Motion, pp, 7-10) is inapplicable in the public-utility context.

Finally, this Court should not declare a statute unconstitutional on its motion calendar without briefing and oral argument. That outcome would undermine ordinary channels of constitutional review by inviting litigants to test their constitutional theories before there is a chance for the Court to fully inform itself of a case.

2. The Bond Requirement is Reasonable

Utilities are required to provide service to customers in their service territory, and unlike other businesses, the rates they can charge to customers are regulated. The duty is set forth in the Ohio Revised Code:

"Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission."

R.C. 4905.22. The bond requirement to receive a stay of execution protects a utility from damages that it would suffer if a stay was issued when it should not have been. *In re Columbus S. Power*, 2011-Ohio-1788, at ¶ 20 ("The legislature has seen fit to attach a significant requirement to the court's stay power: the posting of a bond sufficient to protect the utility against damage."). If the Court were to grant a stay of execution and later determine that it should not have done so, then the utility will not have been able to collect the revenues that the Commission has already deemed fair and reasonable, thereby adversely affecting the utility's

continuing duty to provide necessary and adequate service. Thus, it is reasonable to require a bond as a surety of revenue so the utility can comply with its duty to provide service.

Indeed, the requirement that a bond be posted for a stay is not unusual. The Ohio Rules of Civil Procedure, promulgated by this Court, authorize courts to require a bond for stays on appeal. Civ.R. 62(B) ("When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond."). Additionally, the General Assembly has included bond requirements for appeals authorized by statute. R.C. 6131.26 ("To perfect an appeal . . . the [appellant] shall file an appeal bond, with surety to be approved by the clerk of the court of common pleas . . ."); R.C. 5563.02 (Appellant "must give notice as provided by this section on the date when the order is made dismissing said petition, or refusing to grant the prayer thereof, and file the bond required within the time prescribed."); *In re Duke Energy Ohio, Inc.*, 2014-Ohio-3298, at ¶ 1 ("In conformity with [R.C. 4903.16] and in line with the longstanding precedent of this court, granting a stay in this case requires the posting of a bond.") (O'Donnell, J., separately concurring). Thus, the bond requirement of R.C. 4903.16 is not unusual, and certainly is not unconstitutional.

3. OCC Is Not Exempt from the Bond Requirement

OCC's argument that it should receive a "public office exemption" from the bond requirement also fails. OCC submits that because public officials are exempt from the supersedeas bond requirement under R.C. 2505.12, OCC must therefore be exempt from the bond requirement of R.C. 4903.16. In arguing that it is exempt from the bond requirement under R.C. 2505.12, OCC ignores R.C. 2505.03(B), which provides that "[u]nless . . . other sections of the Revised Code apply, such an appeal is governed by this chapter . . ." Said differently, if an appeal is governed by a statutory scheme outside of R.C. Chapter 2505, the provisions of R.C.

Chapter 2505, including R.C. 2505.12, are inapplicable. In this case, R.C. 4903.16 governs Appellants' ability to obtain a stay. Thus, OCC cannot rely on R.C. 2505.03(B).

Moreover, this Court has repeatedly required OCC to post a bond to obtain a stay under R.C. 4903.16. *In re Columbus S. Power Co.*, 2011-Ohio-1788, at ¶ 20 ("We understand the difficulty a *public agency* such as OCC faces in dealing with the bond requirement. Nevertheless, the statute is clear, and it clearly applies.") (emphasis added). *Accord: In re Duke Energy Ohio, Inc.*, 139 Ohio St.3d at 1490 (requiring OCC to post a bond to receive a stay); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157 (1991) (admonishing OCC for not posting a bond).

C. Appellants Should Post a Bond of at Least \$165 Million

Under R.C. 4903.16, an appellant seeking a stay "shall execute an undertaking . . . conditioned for the prompt payment by the appellant of *all damages* caused by the delay in the enforcement of the order complained of" (Emphasis added.) In this case, the PUCO authorized DP&L to collect \$110 million per year through the SSR. If the Court were to impose a stay, DP&L would lose that revenue, undermining both its ability to provide stable, reliable, and safe service, and its ability to divest its generation assets during that period. Any bond must, at a minimum, recoup that amount. Conservatively estimating that this appeal would be resolved in 18 months, if this Court were to find that a stay is justified, DP&L requests that this Court require Appellants to post a bond of at least \$165 million as a prerequisite for obtaining a stay of the SSR.

Further, DP&L would suffer significant additional financial injury if a stay of the SSR was ordered. Specifically, as demonstrated above, DP&L needs the SSR to maintain its

financial integrity. Without the SSR, DP&L would be unable to make payments owed to its lenders, coal providers, employees and others. If DP&L was unable to make those payments, then DP&L would not be able to operate its business and would be obligated to pay significant financial penalties. Thus, if the Court were to issue a stay of the SSR, then DP&L would suffer significant financial injury above and beyond the \$165 million. The Court therefore should follow *In re Duke Energy Ohio, Inc.*, 139 Ohio St.3d 1490, 2014-Ohio-3298, 12 N.E.3d 1234, and require additional briefing on the appropriate amount of a bond under R.C. 4903.16 before the Court were to order any stay in this case.

IV. THE COURT SHOULD DENY THE JOINT MOTION BECAUSE APPELLANTS CANNOT SATISFY THE CONDITIONS FOR A STAY

This Court should also deny Appellants' Joint Motion because they have failed to satisfy their own proposed test for granting a stay. Appellants specifically ask this Court to follow a four-factor test for staying PUCO decisions that Justice Douglas endorsed in his dissenting opinion in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 510 N.E.2d 806 (1987). That test considers: "[1] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [2] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [3] whether or not, if the stay is issued, substantial harm to other parties would result;² and, [4] above all in these types of cases, where lies the interest of the public." *Id.* at 606 (Douglas, J. dissenting). None of those factors support a stay of the SSR.

² Appellants mischaracterize this element of the test by claiming that they need only show that DP&L would not suffer "irreparable harm," rather than that DP&L would not suffer "substantial harm." Joint Motion, p. 15 n.12.

A. Appellants Fail to Show that They are Likely to Prevail on the Merits Because the SSR is Lawful under R.C. 4928.143(B)(2)(d)

Appellants have not shown that they are likely to prevail on the merits because they fail to refute the PUCO's factual findings that the SSR satisfies the elements of R.C. 4928.143(B)(2)(d). ESP Order, pp. 21-22. Indeed, they largely ignore that statute.

As background, starting January 1, 2001, an electric utility customer could acquire its generation from either its utility or from a competitive provider. R.C. 4928.03. The price that a utility could charge for generation was frozen (with exceptions not relevant here) during a five-year Market Development Period (*i.e.*, until December 31, 2005). R.C. 4928.34(A)(6). After that five-year period, the utility's price was to be deregulated – a utility was permitted to charge a market-based rate. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 15, quoting prior version of R.C. 4928.14(A).

The expectation in 2001 was that deregulation would lead to increased competition and lower prices. However, as this Court has acknowledged, "the cost of generating power increased significantly, due primarily to increases in the costs of the underlying fuel sources." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 3 (internal quotation marks and citation omitted). As a result, as this Court has also acknowledged, competition did not develop in the generation market as expected. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 14 ("the competitive market in DP&L's service territory had not developed as the commission had expected"); *In re Columbus S. Power Co.*, 2011-Ohio-1788, at ¶ 2. Consumers

thus faced the prospect of increased prices when the rate freeze expired after 2005, and utilities were free to charge market-based rates.

To protect customers from the "price volatility and rate shock" that would occur after 2005 if customers were required to pay a market-based rate, the PUCO approved Rate Stabilization Plans for the various Ohio utilities. *Ohio Consumers' Counsel*, 2007-Ohio-4276, at ¶ 15. *Accord: Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 3 ("In response to the commission's concern over market prices at the end of the market-development period, FirstEnergy filed a 'rate-stabilization plan' aimed at preventing the expected rate shock of moving to market rates."). Generally, those Rate Stabilization Plans extended the generation rate freeze for several years.³

In 2008, the General Assembly passed S.B. 221, which substantially amended R.C. Chapter 4928. Customers retained their right to switch to an alternative generation provider. However, S.B. 221 eliminated the requirement that utilities charge a market-based rate to the customers that did not switch. Instead, S.B. 221 required Ohio utilities to offer generation service to those customers at a price that would be established in an SSO. R.C. 4928.141(A). The SSO could be either an MRO or an ESP.⁴ S.B. 221 thus protected customers from the

³ Although no provision in S.B. 3 expressly authorized the PUCO to approve Rate Stabilization Plans, this Court held that the PUCO did have that power. *In re Columbus S. Power Co.*, 2011-Ohio-1788, at ¶ 4.

⁴ Under an MRO, a utility would provide generation service at a price that was a blend of the utility's then-existing rates and rates established through a competitive bidding process. R.C. 4928.142(D). Under the ESP statute, a utility's rates would be set to allow the utility to implement charges related to specific listed items. R.C. 4928.143(B)(2).

volatile and unpredictable nature of the generation market by requiring utilities to provide generation service at a price set through an MRO or ESP.

It is important to understand that S.B. 221 also included provisions that would protect utilities from the volatile and unpredictable nature of the generation market. As mentioned before, the ESP statute, R.C. 4928.143, provides that an ESP may include a charge to allow a utility to provide stable service:

"The plan may provide for or include, without limitation, any of the following:

* * *

Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of *stabilizing or providing certainty regarding retail electric service*"

R.C. 4928.143(B)(2)(d) (emphasis added).⁵

The record demonstrated that since 2010 – consistent with the historic volatile and unpredictable nature of the generation market – the price of generation has decreased significantly and competition in DP&L's service territory has increased significantly. Tr. 135-36 (C. Jackson). The declining prices and increased competition have been good news for customers, and competition and significant switching has taken place in DP&L's service

⁵ Similarly, the MRO statute authorizes the PUCO to adjust the utility's rates "to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result . . . in a taking of property without compensation." R.C. 4928.142(D)(4).

territory. *Id.* However, the significant changes in market conditions now threaten DP&L's financial integrity and its ability to provide safe and reliable service. *Id.*

DP&L proposed the SSR to maintain its financial integrity so that it could continue to provide stable, reliable and safe service under Section 4928.143(B)(2)(d). DP&L's Chief Financial Officer testified that the SSR was "the minimum that DP&L needs to allow it to satisfy its obligations, operate efficiently so as to provide adequate and reliable service and otherwise continue operating as an ongoing entity." Rebuttal Testimony of Craig L. Jackson, p. 8. DP&L's Director of Regulatory Operations also testified that the SSR was "important to the company's ability to provide stable, safe, and reliable electric service." Rebuttal Testimony of DP&L Witness Seger-Lawson, p. 23. An expert in the fields of economics and finance explained further that the SSR "permits [DP&L] to provide quality service to its customers. Alternatively, removal of the SSR will damage DP&L's financial position and integrity substantially, imperiling its ability to provide such quality service to its customers." Second Revised Direct Testimony of William J. Chambers, p. 54.

For the SSR to be lawful under R.C. 4928.143(B)(2)(d), it must satisfy three criteria: (1) it must be a "term[], condition[] or charge[]"; (2) it must "relat[e] to" one of the listed items; and (3) it must "have the effect of stabilizing or providing certainty regarding retail electric service." The PUCO conducted a three-week hearing in this proceeding, during which it heard testimony from 43 different witnesses.⁶ Based upon evidence presented at the hearing, the PUCO found that the SSR satisfied those criteria. Specifically:

⁶ The direct testimony of each witness was pre-filed in written question and answer format; *e.g.*, Second Revised Direct Testimony of Craig L. Jackson. The hearing thus consists principally of
(footnote cont'd...)

(a) A charge: The SSR is a charge to be paid by retail customers. ESP Order, p. 17. The PUCO thus found that it was a "charge." ESP Order, p. 21.

(b) Relating to: DP&L submitted evidence that the SSR related to "bypassability" and "default service." Rebuttal Testimony of DP&L Witness Dona R. Seger-Lawson, p. 23. The PUCO found that the SSR related to those items. ESP Order, p. 21.

(c) Stable service: DP&L presented evidence showing that it would not be able to maintain its financial integrity and provide safe and reliable service without the SSR. Rebuttal Testimony of Craig L. Jackson, p. 8; Rebuttal Testimony of DP&L Witness Seger-Lawson, p. 23; Second Revised Direct Testimony of William J. Chambers, p. 54. The PUCO found "that the SSR would have the effect of stabilizing or providing certainty regarding retail electric service." ESP Order, pp. 21-22.

Appellants do not challenge the PUCO's factual findings that the SSR satisfies the elements of R.C. 4928.143(B)(2)(d). Instead, aside from an argument as to whether the statute allows for nonbypassable charges (which DP&L refutes below), Appellants ignore that statute. The Appellants cannot show a likelihood of success when they have ignored the elements of the applicable statute and have ignored the PUCO's factual findings that those elements were satisfied.

(...cont'd)

cross-examination of the witnesses. The hearing would have taken considerably longer if the direct examinations were conducted orally.

B. Appellants Fail to Show that They are Likely to Prevail on the Merits Because R.C. 4928.143(B)(2)(d) Permits Nonbypassable Charges

Rather than challenge the fact that the SSR meets the requirements of R.C.

4928.143(B)(2)(d), Appellants contend that the statute does not allow the PUCO to authorize a nonbypassable rider. Joint Motion, pp. 20-21. However, Appellants' argument is divorced from the statute's text, which allows an ESP to include

"[t]erms, conditions, or charges *relating to* limitations on customer shopping for retail electric generation service, *bypassability*, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service[.]" (Emphasis added.)

R.C. 4928.143(B)(2)(d). Appellants do not even attempt to explain why a nonbypassable charge is not a charge "relating to . . . bypassability."

The PUCO found that R.C. 4928.143(B)(2)(d) "authorizes electric utilities to include in an ESP terms related to bypassability of charges to the extent that such terms have the effect of stabilizing or providing certainty regarding retail electric service." ESP Order, p. 21. Indeed, without the charge, customers who have switched to competitive providers (*i.e.*, shopping customers), would be able to avoid the SSR entirely, thwarting the purpose of the SSR to maintain DP&L's financial integrity. The record demonstrates that customer switching has increased in recent years and will continue to increase in the coming years. Second Revised Direct Testimony of Aldyn W. Hoekstra, p. 7. A bypassable SSR (*i.e.*, a charge customers could avoid by switching) would further incentivize switching and, thus, undermine DP&L's financial integrity and, thereby, its ability to provide stable, reliable, and safe service. Consequently, the PUCO determined, "[b]oth shopping and non-shopping customers benefit from the existence of

the standard service offer, which is available even if market conditions become unfavorable for retail shopping customers over the term of the ESP." ESP Order, p. 21. Thus, "the SSR should be nonbypassable." *Id.*

C. Appellants Fail to Show that They are Likely to Prevail on the Merits Because the SSR is Not Barred by Other Statutes

Appellants maintain that even if the SSR satisfies the requirements of R.C. 4928.143(B)(2)(d), the charge nevertheless violates R.C. 4928.38 as an alleged transition charge and R.C. 4928.02(H) and 4928.17 as an alleged anticompetitive subsidy. That argument fails for three separate reasons: (1) R.C. 4928.143(B)(2)(d) applies "[n]otwithstanding" the statutes cited by Appellants; (2) there is no conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38, 4928.02(H), and 4928.17; and (3) even if there were a conflict, R.C. 4928.143(B)(2)(d) controls as the most-recently enacted statute.

1. R.C. 4928.143(B)(2)(d) Allows the SSR "Notwithstanding" the Statutes Relied Upon by Appellants

In their Joint Motion, Appellants disregard the prefatory language of Section 4928.143(B), which provides:

"Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20 , division (E) of section 4928.64, and section 4928.69 of the Revised Code

R.C. 4928.143(B) (emphasis added). Thus, by the plain language of the statute, if a charge is lawful under R.C. 4928.143(B), the charge is lawful unless it is prohibited by R.C. 4928.143(D); R.C. 4928.20(I), (J), or (K); R.C. 4928.64(E); R.C. 4928.69; or some other statute falling outside of Title 49 of the Revised Code.

Appellants argue that even if the SSR were authorized by R.C. 4928.143(B)(2)(d), then it is, nevertheless, prohibited by R.C. 4928.38 as a transition charge and R.C. 4928.02(H) and 4928.17 as an anticompetitive subsidy. However, not one of those provisions is mentioned in the prefatory language of R.C. 4928.143(B). Thus, the plain language of R.C. 4928.143(B) establishes that the SSR is lawful "notwithstanding" those sections.

2. There is No Conflict Between R.C. 4928.143(B)(2)(d) and R.C. 4928.38, 4928.02(H) and 4928.17

Appellants also fail to show that R.C. 4928.143(B)(2)(d) conflicts with R.C. 4928.38, 4928.02(H), or 4928.17 because the SSR is neither a transition charge nor an anticompetitive subsidy.

a. The SSR is not a Transition Charge under R.C. 4928.38

The PUCO found that the SSR was not a transition charge because it is not a cost-based charge. Mar. 19, 2014 Second Entry on Rehearing, p. 6. The statute authorizing the recovery of transition charges states:

"[T]he public utilities commission . . . shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues Such amount shall be the just and reasonable transition *costs* of the utility, which *costs* the commission finds meet all of the following criteria:

- (A) The *costs* were prudently incurred.
- (B) The *costs* are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.
- (C) The *costs* are unrecoverable in a competitive market.
- (D) The utility would otherwise be entitled an opportunity to recover the *costs*."

R.C. 4928.39 (emphasis added).

Transition revenues therefore recover specific "costs." This Court has recently held that a cost-based charge must be "related to a[] cost[] [that the utility] will incur." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25 (reversing PUCO decision approving charge for utility because there was no evidence supporting the PUCO's finding that the charge would compensate utility for the costs at issue in the case).

The record shows that the SSR was established to allow DP&L to earn a targeted return on equity so that DP&L could maintain its financial integrity and could therefore provide stable and certain service under R.C. 4928.143(B)(2)(d); the SSR thus was not a transition charge since it was not designed to recover any specific costs. Rebuttal and Supplemental Testimony of R. Jeffrey Malinak, pp. 17-18. *Accord:* Tr. 2871 (J. Malinak) ("Q. Is the SSR . . . designed to recover any particular costs? A. No. Those charges are designed to increase the probability that DP&L, as a whole, will be able to maintain its financial integrity going into the future or under certain assumptions."); Tr. 552 (W. Chambers) ("the SSR is not a cost-based from that standpoint . . . it is a general amount of money that contributes significantly to the ongoing financial integrity of the company"); Tr. 823 (N. Parke), 1304-05 (D. Seger-Lawson).

The PUCO's factual finding (Mar. 19, 2014 Second Entry on Rehearing, p. 6) that the SSR was not a cost-based charge, and thus was not a transition charge, was thus amply supported by the record. In fact, the PUCO cited the evidence upon which it relied to support that finding (*id.*), and Appellants never dispute that those facts were sufficient to support the PUCO's finding.

b. The SSR is Not an Anticompetitive Subsidy under R.C. 4928.02(H) or 4928.17

Appellants' argument that the SSR amounts to an anticompetitive subsidy of DP&L's generation services ignores the PUCO's factual finding that "[a]lthough generation, transmission, and distribution rates have been unbundled, DP&L *is not* a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility." ESP Order, p. 22 (emphasis added). Appellants pretend that DP&L is not an integrated company and, instead, is two companies: a transmission and distribution company and a generation company. Thus, a subsidy analysis is not required by the Ohio statutes with respect to the internal operations of an integrated company, and no case has so held. Appellants also ignore the policy of R.C. 4928.02(A) of ensuring that DP&L can provide "reliable [and] safe . . . retail electric service," which includes generation service under R.C. 4928.01(A)(27).

Appellants particularly rely on *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, No. 10-1454-EL-RDR, Finding and Order (Jan. 11, 2012). In *Sporn*, AEP sought to collect the costs associated with the closure of a generating facility through a distribution rider. Finding and Order, p. 1. The PUCO rejected that request, holding that "there is no statutory basis upon which to grant recovery of the closure costs for [a generating facility]." *Id.* at 18. Here, in contrast, there is a statutory basis for DP&L's request – R.C. 4928.143(B)(2)(d). Indeed, the PUCO's decision in AEP's more recent ESP case, the Commission held that a rider very similar to DP&L's SSR is lawful. AEP Aug. 8, 2012 Opinion and Order, pp. 31-32 (Pub. Util. Case Nos. 11-346-EL-SSO, *et al.*); Jan. 30, 2013 Entry on Rehearing, p. 15 (Pub. Util. Case Nos. 11-346-EL-SSO, *et al.*).

**3. Even if there Were a Conflict Among the Statutes,
R.C. 4928.143(B)(2)(d) Was the Last-Enacted Statute**

Even assuming, for the sake of argument, that the SSR is a transition charge or an anticompetitive subsidy, the SSR still would be lawful because R.C. 4928.143(B)(2)(d) was enacted after R.C. 4928.38, 4928.02(H), and 4928.17. Specifically, R.C. 4928.38 was enacted in 1999, and provides that "[t]he commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." R.C. 4928.02(H) and 4928.17 also were enacted in 1999. Nine years later, the General Assembly passed SB 221, which included R.C. 4928.143(B)(2)(d).

If the Court were to conclude that the SSR was barred by R.C. 4928.38 (as a transition charge) or R.C. 4928.02(H) and 4928.17 (as an anticompetitive subsidy), but was authorized under R.C. 4928.143(B)(2)(d) (as a stability charge), then the Court should conclude that R.C. 4928.143(B)(2)(d) controls because it was enacted *after* R.C. 4928.38, 4928.02(H), and 4928.17. It is well settled that if two statutes conflict, then the later-passed statute controls. R.C. 1.52(A) ("If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."); *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 33 (holding that two statutes conflicted and that "the more recent . . . statute prevails") (citation omitted); *Stutzman v. Madison Cty. Bd. of Elections*, 93 Ohio St.3d 511, 517, 757 N.E.2d 297 (2001) ("the statute later in date of enactment, prevails").

Thus, even if the SSR was a transition charge or an anticompetitive subsidy (as demonstrated above, the SSR is not), it would still be lawful because R.C. 4928.143(B)(2)(d) was enacted after R.C. 4928.38.

D. Appellants Fail to Satisfy the Remaining Conditions for a Stay

Appellants also have not demonstrated that (1) without a stay they would suffer irreparable harm, (2) substantial harm to other parties would not result if the stay were issued, and (3) that a stay would be in the public interest. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., dissenting).

Appellants repeatedly argue that DP&L would not be harmed if the Court were to stay the collection of the SSR without citing any factual support in the record.⁷ That failure to cite the record is not surprising, as the record demonstrates that DP&L would, in fact, suffer substantial harm if this Court were to stay the SSR. As demonstrated above, the testimony of DP&L's witnesses demonstrated that it could not provide stable and reliable service without the SSR,⁸ and the PUCO so found.⁹

⁷ Joint Motion, p. 11 (claiming without record support that "if the Court stays the collection of the rates and eventually reverses the Commission decision, then neither the customers nor the utility is harmed"); p. 14 (claiming without record support that "[DP&L] will not be materially harmed by a stay"), pp. 29-30 (failing to cite to the record in the argument section that a stay would not harm to DP&L). As noted above, Appellants mischaracterize Justice Douglas's four-part test by suggesting that they need only show that "the stay would not cause irreparable harm." *Id.* at 15 n.12. In fact, the test considers whether a stay would cause "substantial harm to other parties." *MCI Telecommunications Corp.*, 31 Ohio St.3d at 606 (Douglas, J., dissenting).

⁸ DP&L Ex. 12, p. 23 (Seeger-Lawson Rebuttal); DP&L Ex. 16A, p. 8 (Jackson Rebuttal); DP&L Ex. 4A, p. 54 (Chambers Revised Direct).

⁹ ESP Order, pp. 21-22.

Instead of recognizing that the factual record is contrary to their position, Appellants take the myopic view that the only potential harm to Appellants is the cost of their electricity. Appellants also conflate the public interest only with the customers paying less for electricity. Appellants ignore the fact that without the SSR, DP&L's ability to provide stable, reliable, and safe retail electric service will be compromised, which would irreparably harm DP&L's customers and would be contrary to the public interest. ESP Order, pp. 21-22.

In addition, the General Assembly has determined that it is in the public interest for Ohio's electric utilities to divest their generation assets. R.C. 4928.17. That process will require DP&L to devote sufficient revenues to pay down mortgage debt over the next two years. June 4, 2014 Fourth Entry on Rehearing, pp. 4-5. The SSR was authorized in that context. As the PUCO recognized, "[a]t the hearing in this case, DP&L witnesses testified that there are terms and conditions in certain bonds that significantly impede upon its ability to transfer its generation assets to an affiliate before September 1, 2016, and, due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds before 2017." *Id.* at 5. The SSR is needed to maintain DP&L's financial integrity through that process. ESP Order, p. 22 (finding that "SSR is the minimum amount necessary to maintain its financial integrity").

V. **THE COURT SHOULD DENY THE JOINT MOTION BECAUSE A PARTIAL STAY OF THE ESP ORDER IS NEITHER CONTEMPLATED BY R.C. 4903.16 NOR APPROPRIATE**

This Court should also reject the Joint Motion because a partial stay of the ESP Order and subsequent entries on rehearing is neither contemplated by R.C. 4903.16 nor appropriate in this case. R.C. 4903.16 allows parties to file an application to "stay execution" of "a final order rendered by the public utilities commission." The statute does not provide for a partial stay of a PUCO order.

Moreover, while the SSR provides DP&L with critical revenue, other features of DP&L's ESP subject the utility to costly burdens, such as the competitive bidding process. ESP Order, pp. 12-17. The PUCO imposed those obligations assuming that the SSR would offset their costs and, thus, maintain DP&L's financial integrity. *Id.* at 21. Removing the SSR, while leaving the other aspects of the ESP intact, would destroy the balance struck by the PUCO.

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 Motion for a Stay by Industrial Energy Users-Ohio and The Office of The Ohio Consumers' Counsel has been served via electronic mail, upon the following counsel of record, this 24th day of October, 2014:

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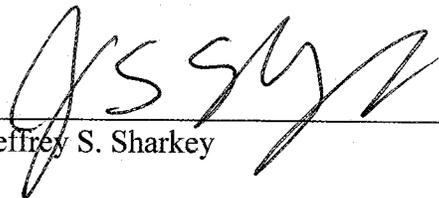
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