

**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of :  
The Dayton Power and Light Company : Supreme Court Case No. 2014-1505  
for Approval of Its Electric Security Plan. :

In the Matter of the Application of :  
The Dayton Power and Light Company :  
for Approval of Revised Tariffs. : Appeal from the Public Utilities  
Commission of Ohio

In the Matter of the Application of :  
The Dayton Power and Light Company : Public Utilities Commission of Ohio  
for Approval of Certain Accounting : Case Nos. 12-426-EL-SSO,  
Authority. : 12-427-EL-ATA,

In the Matter of the Application of : 12-428-EL-AAM,  
The Dayton Power and Light Company : 12-429-EL-WVR, and  
for Waiver of Certain Commission Rules. : 12-672-EL-RDR

In the Matter of the Application of :  
The Dayton Power and Light Company :  
to Establish Tariff Riders. :

Industrial Energy Users-Ohio, :  
Appellant, :

v. :

Public Utilities Commission of Ohio, :  
Appellee. :

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**JOINT MOTION OF APPELLANTS/CROSS-APPELLEES INDUSTRIAL ENERGY  
USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
TO VACATE THE ORDERS OF THE PUBLIC UTILITIES COMMISSION OF OHIO  
AUTHORIZING THE SERVICE STABILITY RIDER AND TO REMAND THE CASE  
TO THE COMMISSION FOR ORDERS CONSISTENT WITH THE COURT'S  
VACATUR**

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**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	: : :	Supreme Court Case No. 2014-1505
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	: : :	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	: : : :	Public Utilities Commission of Ohio Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM,
In the Matter of the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	: : :	12-429-EL-WVR, and 12-672-EL-RDR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	: : :	
Industrial Energy Users-Ohio,  Appellant,	: : : : :	
v.	: : :	
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USERS-OHIO AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
TO VACATE THE ORDERS OF THE PUBLIC UTILITIES COMMISSION OF OHIO  
AUTHORIZING THE SERVICE STABILITY RIDER AND TO REMAND THE CASE  
TO THE COMMISSION FOR ORDERS CONSISTENT WITH THE COURT'S  
VACATUR**

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In its orders below, Appellee/Cross-Appellee the Public Utilities Commission of Ohio (“Commission”) authorized the Appellee/Cross-Appellant The Dayton Power and Light Company (“DP&L”) to bill and collect \$110 million annually through a nonbypassable charge, the Service Stability Rider (“SSR”), to replace revenue DP&L claimed it lost to competition and low wholesale energy and capacity prices. This Court recently concluded that the Commission had no authority to authorize such charges. *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Slip Opinion No. 2016-Ohio-1608, ¶ 13-25 (“*Columbus Southern*”). To prevent the further unlawful collection of these charges and to protect the 600,000 customers of DP&L, Appellant/Cross-Appellee Industrial Energy Users-Ohio (“IEU-Ohio”) and Appellant/Cross-Appellee the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “Joint Movants”) move the Court pursuant to S.Ct.Prac.R. 4.01(A) to issue an order vacating the orders of the Commission authorizing the collection of unlawful transition revenue through DP&L’s SSR charge.

Joint Movants also request that the Court remand the case to the Commission and direct the Commission to take action to suspend its authorization of the SSR charge within ten days of the Court’s order vacating the Commission’s authorization of the SSR charge. If the Court grants the relief sought herein, it will dispel of the need for an oral argument on the propositions of law raised in Joint Movants’ appeals as all such propositions of law relate, in one form or another, to the unlawful authorization of the SSR charge.

The reasons supporting this Motion are set out in the accompanying Memorandum in Support.

Respectfully submitted,

*/s/ Matthew R. Pritchard*

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## MEMORANDUM IN SUPPORT

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### I. INTRODUCTION

Utilities were provided one opportunity to seek approval to collect transition revenue. Under this limited opportunity, DP&L was authorized to collect \$441 million in transition revenue from its customers beginning in 2001. IEU-Ohio First Merit Brief at 3 (*citing* IEU-Ohio Ex. 14 at 30 (Supp. at 50)).<sup>1</sup> The period to collect transition revenue could not extend beyond 2010, and utilities have no further right to collect transition revenue or its equivalent. R.C. 4928.40. Further, the Commission is prohibited by R.C. 4928.38 from authorizing a utility to collect transition revenue or its equivalent.

In two decisions issued in 2012 and 2013 in electric security plan (“ESP”) cases involving Ohio Power Company (“AEP-Ohio”) and DP&L, respectively, the Commission authorized the collection of transition revenue or its equivalent in violation of R.C. 4928.38. For AEP-Ohio, the collection of transition revenue or its equivalent occurred through its Retail Stability Rider (“RSR”) charge; for DP&L the collection of transition revenue or its equivalent occurs through its SSR charge.<sup>2</sup>

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<sup>1</sup> All references to an Appendix (“Appx.”) or Supplement (“Supp.”) in this Motion refer to the Appendix and Supplement IEU-Ohio filed in conjunction with its First Merit Brief in this appeal.

<sup>2</sup> The authorization of these charges resulted in customers being required to pay the utilities nearly a billion dollars of transition revenue; \$508 million in the case of AEP-Ohio’s RSR charge, and \$330 million in the case of DP&L’s SSR charge. Opinion and Order at 25-26 (Appx. at 33-34); Entry Nunc Pro Tunc at 2 (Appx. at 64); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 35 (Aug. 8, 2012), available at:

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138>.

In the two ESP cases, the Commission approved charges under nearly identical rationales that permitted the utilities to replace revenue lost to competition and low wholesale energy and capacity prices. The Commission also explicitly relied upon its authorization of AEP-Ohio's charge as a basis for authorizing DP&L's charge. Opinion and Order at 22 (Appx. at 30).

The Court, however, recently held that the Commission acted unlawfully and unreasonably when it authorized AEP-Ohio's RSR charge. *Columbus Southern*, 2016-Ohio-1608, ¶ 13-25. Finding that the nature of AEP-Ohio's charge allowed AEP-Ohio to collect the equivalent of transition revenue, the Court held the Commission had violated the prohibition in R.C. 4928.38 and reversed and remanded the case to the Commission for further proceedings consistent with the Court's decision.

The implications of the Court's holding in *Columbus Southern*, however, reach beyond the confines of the AEP-Ohio appeal. Because DP&L's arguments in support of the SSR charge and the rationale adopted by the Commission for its authorization of DP&L's charge are nearly identical to the Commission's authorization of AEP-Ohio's RSR charge, the Court's holding in *Columbus Southern* is controlling and requires a reversal of the authorization of DP&L's charge.

To prevent further injury to customers as a result of the Commission's unlawful authorization of the SSR charge, DP&L's customers are requesting immediate action by the Court. The collection period for the SSR charge ends December 31, 2016. As each month goes by, DP&L's customers pay nearly \$10 million in unlawful transition revenue or its equivalent to DP&L, and have already paid approximately \$250 million. Unless the Court intervenes, DP&L's customers will continue to pay the unlawful transition charge.

Accordingly, Joint Movants request that the Court immediately vacate the portions of the Commission's orders on appeal authorizing DP&L's unlawful SSR charge. The Court should

also remand the case to the Commission and direct the Commission to take prompt action to suspend DP&L's unlawful charge.

## II. ARGUMENT

In a 2012 ESP case, the Commission approved the RSR as a nonbypassable charge for AEP-Ohio. That charge permitted AEP-Ohio to recover a target amount of revenue, \$826 million, to replace revenue AEP-Ohio lost as a result of generation competition and low wholesale energy and capacity prices. *See Columbus Southern*, at ¶ 24. The authorization of AEP-Ohio's charge was appealed to the Court.

While the Commission was reviewing AEP-Ohio's ESP application and request for the RSR charge, DP&L filed an application for an ESP that contained a request for authorization of the SSR charge. In its application, DP&L claimed that it needed its charge to make up for revenue lost due to increased customer switching, declining wholesale energy prices, and declining capacity prices. Opinion and Order at 17 (Appx. at 25). The Commission authorized DP&L's SSR charge and permitted DP&L to bill and collect \$110 million annually from its customers for three years through the end of 2016. Opinion and Order at 25-26 (Appx. at 33-34); Entry Nunc Pro Tunc at 2 (Appx. at 64). The authorization of DP&L's charge was also appealed to the Court.

In the first case in which the Court has reached a decision, the Court in *Columbus Southern* agreed with customers that the Commission had acted unlawfully and unreasonably and reversed and remanded the AEP-Ohio case to the Commission. As the Court explained in *Columbus Southern*, “[u]tilities had until December 31, 2005 ... to receive generation transition revenue ... [and] were also permitted to receive transition revenue associated with regulatory assets ... until December 31, 2010.” *Columbus Southern*, at ¶ 16. “After that date, R.C. 4928.38

prohibits the commission from ‘authoriz[ing] the receipt of transition revenues or any equivalent revenues by an electric utility.’” *Id.* The Court also noted that subsequent legislation enacted in 2008 further “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.” *Id.* at ¶ 17.

Turning to the record in the AEP-Ohio case, the Court looked at the true nature of the RSR charge to determine if it allowed the collection of transition revenue or its equivalent. The Court found that AEP-Ohio “proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.” *Id.* at ¶ 23. To achieve this result, AEP-Ohio requested that the Commission “guarantee recovery of lost revenue” through the RSR charge related to three sources of generation revenue: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching. *Id.* at ¶ 23-24. “According to [AEP-Ohio’s] witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015.” *Id.* at ¶ 23. The Court also noted that the Commission had approved the RSR charge “to provide AEP with sufficient revenue to maintain its financial integrity and ability to attract capital during the ESP.” *Id.* at ¶ 8.

Based on the nature of AEP-Ohio’s charge, the Court found that the record supported a finding that the Commission unlawfully authorized AEP-Ohio to collect transition revenue or its equivalent. *Id.* at ¶ 22. The Court found that the nature of AEP-Ohio’s charge served the same purpose as transition revenue: both were designed to aid in transitioning to a competitive market. *Id.* at ¶ 22-23. The Court also noted that transition revenue represented costs that would not be recovered in a competitive market and AEP-Ohio’s charge provided AEP-Ohio with

revenue lost in the competitive market. *Id.* at ¶ 22-23. “Based on [this] record” the Court concluded that AEP-Ohio’s RSR charge “recovers the equivalent of transition revenue ....” *Id.* at ¶ 25.

The Court also rejected the Commission’s claim that AEP-Ohio’s charge was not transition revenue because AEP-Ohio did not seek recovery of transition revenue. *Id.* at ¶ 20. “[T]he fact that AEP did not explicitly seek transition revenues does not foreclose a finding that the company is receiving the equivalent of transition revenue under the guise of the RSR.” *Id.* at ¶ 21. “By inserting the phrase ‘any equivalent revenues,’ the General Assembly has demonstrated its intention to bar not only transition revenue associated with costs that were stranded during the transition to market following S.B. 3 but also any revenue that amounts to transition revenue by another name.” *Id.* Accordingly, the Court concluded “that the Commission erred in focusing solely on whether AEP had expressly sought to receive transition revenues rather than looking at the nature of the costs recovered through the RSR.” *Id.* at ¶ 25.

Like AEP-Ohio’s charge, DP&L’s charge permits DP&L to collect transition revenue or its equivalent. The “nature” of DP&L’s SSR charge in this case is identical to the nature of AEP-Ohio’s charge that the Court held was an unlawful transition charge. DP&L proposed its charge for similar reasons as AEP-Ohio: to make up for revenue DP&L was not receiving in the competitive generation market primarily related to “increased [customer] switching, declining wholesale prices, and declining capacity prices.” *Compare* Opinion and Order at 17 (Appx. at 25); *with Columbus Southern*, at ¶ 24 (in calculating a revenue requirement for AEP-Ohio’s charge, the Commission focused on three generation-related factors: nonfuel generation

revenue, capacity revenues, and customer switching).<sup>3</sup> Further, DP&L's charge was designed to ensure that it collected enough revenue through its charge to earn a return between 7 and 11 percent, just as the Commission had authorized for AEP-Ohio. Opinion and Order at 25 (Appx. at 33) (concluding a return on equity range of 7-11% for DP&L's charge was reasonable because it was consistent with the Commission's prior treatment of AEP-Ohio's charge); *see also* IEU-Ohio First Merit Brief at 6-7. The AEP-Ohio and DP&L charges were also related to claims that they would protect the utilities' financial integrity. *Columbus Southern*, at ¶ 8; Opinion and Order at 22 (Appx. at 30).

If there was any question that AEP-Ohio's charge and DP&L's charge are equivalent unlawful transition charges, DP&L and the Commission removed any doubt as they repeatedly cited to the Commission's authorization of AEP-Ohio's RSR charge as a basis for the authorization of DP&L's SSR charge. In its post-hearing briefs, DP&L argued that the Commission should approve its charge because "the SSR is substantially similar to AEP's Rate Stabilization Rider (RSR) approved by the Commission." Opinion and Order at 17 (Appx. at 25). The Commission also cited to its approval of AEP-Ohio's charge as a basis for authorizing the magnitude of DP&L's charge. Opinion and Order at 25 (Appx. at 33). The Commission further found that its authorization of DP&L's charge and rejection of arguments that DP&L's charge would allow DP&L to collect transition revenue or its equivalent was "consistent with [its] decision in the *AEP ESP II Case*, in which [it] determined that AEP-Ohio's proposed RSR did not allow for the collection of inappropriate transition revenues or stranded costs." Opinion and Order at 22 (Appx. at 30). Finally, in its amicus brief filed in the AEP-Ohio appeal, DP&L

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<sup>3</sup> DP&L confirmed during the hearing that the SSR charge was driven solely by its generation business as it admitted that its revenue from its other two lines of business, transmission and distribution, were adequate and would remain so. IEU-Ohio First Merit Brief at 17-18 (*citing* DP&L Ex. 1 at 13 (Supp. at 2); Tr. Vol. I at 118 (Supp. at 73); Tr. Vol. I at 150 (Supp. at 81)).

argued to the Court that the record supporting its charge “closely resembles” the record that AEP-Ohio developed in support of AEP-Ohio’s charge. *Columbus Southern*, S.Ct. Case No. 2013-521, Merit Brief of Amicus Curiae DP&L in Support of Appellee PUCO at 6 (Oct. 21, 2013).

Further, as it had done with respect to AEP-Ohio’s charge, the Commission rejected claims that DP&L’s charge unlawfully allowed DP&L to collect transition revenue or its equivalent because DP&L had not requested additional transition revenue. Opinion and Order at 22 (Appx. at 30).<sup>4</sup> As noted above, the Court has already rejected the Commission’s rationale and held that a charge could be overturned if the “nature” of the charge was equivalent to a transition charge. *Columbus Southern*, at ¶ 25.

Simply put, DP&L’s SSR charge is substantially similar to AEP-Ohio’s RSR charge that was held to be an unlawful transition charge.

Customers have attempted repeatedly to prevent the Commission from taking the unlawful actions it did in the case below, but the Commission has refused to reverse its authorization of DP&L’s SSR charge or authorize its collection subject to refund. Due to the Commission’s continued unlawful authorization of DP&L’s SSR charge, DP&L’s customers are paying nearly \$10 million a month in unlawful transition charges. Because the Commission has failed to lawfully authorize the charge and there is no longer any legal justification for customers to pay DP&L’s unlawful SSR charge, Joint Movants request that the Court issue an order reversing the Commission’s authorization of the charge. Joint Movants further request that the

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<sup>4</sup> See also IEU-Ohio First Merit Brief at 19 (“First, the Commission’s claim that [the SSR charge] is not transition revenue or its equivalent because DP&L did not request additional transition revenue or claim that its transition plan did not produce adequate transition revenue is meritless.”) (*citing* Opinion and Order at 22 (Appx. at 30)); *id.* (“It is irrelevant that DP&L did not request ‘transition’ revenue when that is exactly the result the Commission approved.”).

Court remand the case to the Commission with a directive that the Commission implement the Court's decision within ten days.

This Motion is premised on similar action the Court took in 2006 when it vacated the Commission's unlawful authorization of a rate plan that did not include a competitively bid component and reversed and remanded another Commission case because it presented the same legal errors. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 511, 2006-Ohio-3054.

In the first of these two *Consumers' Counsel* cases, the Court was presented with arguments that FirstEnergy's rate plan violated former R.C. 4928.14(B) because the Commission had failed to include in the plan an option for customers "to purchase competitive retail electric service the price of which is determined through a competitive bidding process." *Consumers' Counsel*, 2006-Ohio-2110 at ¶ 16 (quoting former R.C. 4928.14(B)). The Court held that the Commission's decision to eliminate the required competitive bid price from the rate plan was unlawful.

In the second *Consumers' Counsel* case, the Court was presented with a substantially similar challenge to the Commission's refusal to include the competitive bidding process option in AEP-Ohio's rate plan as required by R.C. 4928.14(B).<sup>5</sup> *Consumers' Counsel*, 2006-Ohio-

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<sup>5</sup> OCC's second proposition of law in its appeal of AEP-Ohio's rate plan read:

The Commission's Opinion and Order violates R.C. 4928.14(A), which requires that a market-based standard service offer be available to customers at the end of the Market Development Period ("MDP"), and R.C. 4928.14(B), which requires that an option to purchase competitive retail electric service at a price determined through a competitive bidding process ("CBP") also be available to customers at the end of the MDP.

*Consumers' Counsel v. Pub. Util. Comm.*, S.Ct. Case No. 2005-767, Notice of Appeal at 2 (Apr. 29, 2005), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=KD15ZIB4U0LM7OT4>.

3054 at ¶ 1. The Court disposed of the appeal without oral argument based on its decision in the first appeal:

Based on the second proposition of law in appellant's brief and our decision in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, the decision of the Public Utilities Commission is vacated, and the cause is remanded for further proceedings not inconsistent with that decision. This order does not preclude appellant from raising its first, third, fourth, and fifth propositions of law in a future appeal from the Public Utilities Commission.

*Id.*

Joint Movants request that the Court adopt the same process in this appeal. Specifically, Joint Movants request that the Court vacate the Commission's orders with respect to the Commission's authorization of DP&L's SSR charge and remand the case back to the Commission and direct the Commission to take action within ten days of the Court's order to suspend the authorization of DP&L's SSR charge. Joint Movants and other appellants should also not be precluded from raising their remaining propositions of law in a future appeal if such additional appeal is warranted. If the Court grants the relief sought herein, it will dispel of the need for an oral argument on the propositions of law raised in Joint Movants' appeals as all such propositions of law relate, in one form or another, to the unlawful authorization of DP&L's SSR charge.

### **III. CONCLUSION**

To protect DP&L's 600,000 customers from continuing to pay DP&L's unlawful transition charge, Joint Movants request that the Court vacate the Commission's orders on appeal with respect to the Commission's authorization of DP&L's SSR charge. Joint Movants further request the Court to remand the case to the Commission with directions that the Commission suspend its authorization of DP&L's SSR charge within ten days of the Court's order.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Joint Motion of Appellants/Cross-Appellees Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel to Vacate the Orders of the Public Utilities Commission of Ohio Authorizing the Service Stability Rider and to Remand the Case to the Commission for Orders Consistent with the Court's Vacatur* was served upon the parties of record *via* electronic transmission this 12<sup>th</sup> day of May 2016.

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