Supreme Court of Ohio Clerk of Court - Filed May 18, 2016 - Case No. 2014-1505

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, etc.	:	Case No. 14-1505 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

MEMORANDUM OF THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE DAYTON POWER AND LIGHT COMPANY IN OPPOSITION TO JOINT MOTION OF 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

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I. INTRODUCTION AND SUMMARY

Appellants/Cross-Appellees Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (together, "Joint Movants") repeatedly argue in their Joint Motion[1] that the Court should cancel oral argument and vacate all orders on appeal because the Service Stability Rider ("SSR") is "nearly identical" (p. 5) to the Retail Stability Rider ("RSR") recently at issue in *In re Application of Columbus S. Power Co.*, Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608 (Sup. Ct. Ohio Apr. 21, 2016) ("*AEP Case*") (holding that the RSR collected the "equivalent" of "transition revenue," in violation of R.C. 4928.38). That assertion is false.

Specifically, Joint Movants ignore two significant issues raised by Appellee the Public Utilities Commission of Ohio ("Commission") and Appellee/Cross-Appellant The Dayton Power and Light Company ("DP&L"), which show that R.C. 4928.38 does not apply to charges authorized pursuant to R.C. 4928.143(B)(2)(d) – like the SSR. *First*, the Commission and DP&L argue that the "[n]otwithstanding" clause of R.C. 4928.143(B) negates the applicability of R.C. 4928.38 to such charges.[2] *Second*, the Commission and DP&L argue that as the later-

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[1] May 12, 2016 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.

[2] Jan. 20, 2015 Second Merit Brief Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, p. 20; Jan. 20, 2015 Brief of Cross-Appellant The Dayton Power and Light Company ("DP&L Merit Brief"), pp. 17-18; May 13, 2016 Supplemental Brief of Appellee The Public Utilities Commission of Ohio and Cross-Appellant The Dayton Power and Light Company Regarding Recent Supreme Court Decision ("Supplemental Brief"), pp. 3-6 (appended to the May 13, 2016 Motion of Appellee The Public Utilities Commission of Ohio and

(footnote cont'd...)

enacted statute, R.C. 4928.143(B)(2)(d) cannot be limited by R.C. 4928.38.[3] These issues were neither raised by the parties nor considered by the Court's majority in the *AEP Case*. However, since they are argued in the parties' briefs here, the Court should not dispense with this appeal without addressing them.

Separately, the Joint Motion should be denied because it invites piecemeal appeals from Commission. Without citing any authority, Joint Movants ask the Court to split this appeal by accepting their propositions of law relating to the SSR, while requiring parties to raise their remaining propositions of law on another day. Such a maneuver is not contemplated by R.C. 4903.11 through 4903.13, which govern exclusively this Court's jurisdiction in appeals from the Commission. Ohio Constitution, Article IV, Section 2(B)(2)(d) (granting the Court "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law*") (emphasis added). Moreover, such action would be inconsistent with the Court's "disfavor of piecemeal appeals arising from commission proceedings." *Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 368, 588 N.E.2d 775 (1992) (per curiam). Instead, the Court should proceed with oral argument, and issue a decision in due course on the merits of this appeal.

II. BACKGROUND: RECENT RULING IN THE AEP CASE

The Ohio General Assembly deregulated the generation market in 1999, but partially re-regulated the market in 2008. Specifically, in 1999, the General Assembly required

(...cont'd)
Appellee/Cross-Appellant The Dayton Power and Light Company for Leave to File Supplemental Brief Regarding Recent Supreme Court Decision).

[3] DP&L Merit Brief at 19-20; Supplemental Brief, pp. 6-9.

electric distribution utilities to charge their customers a "market based" rate[4] and permitted limited recovery of transition costs.[5]

In 2008, Am.Sub.S.B. 221 repealed the section requiring utilities to charge a market based rate, and instead required utilities to charge rates set through a Market Rate Offer or an Electric Security Plan ("ESP"). R.C. 4928.141, 4928.142, 4928.143. Critically, as part of an ESP, a utility was authorized to recover a charge that would allow the utility to provide stable and certain "retail electric service." R.C. 4928.143(B)(2)(d). The term "retail electric service" is defined to include generation service. R.C. 4928.01(A)(27). Section 4928.143(B)(2)(d) thus authorized the Commission to approve charges that will lead to stable generation service in the future.

In the *AEP Case*, the Court held that AEP's RSR was a lawful under R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.*, Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶43-59 (Sup. Ct. Ohio Apr. 21, 2016). However, the Court ruled that the RSR was barred by R.C. 4928.38. Id. at ¶ 14-40.

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[4] *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). (IEU Appx. 157.)

[5] R.C. 4928.37 – R.C. 4928.40.

III. THE COURT SHOULD AFFIRM THE COMMISSION'S ORDERS ON GROUNDS THAT WERE NEITHER RAISED BY THE PARTIES NOR ADDRESSED BY THE MAJORITY IN THE AEP CASE

A. A STABILITY CHARGE IS LAWFUL "NOTWITHSTANDING ANY OTHER PROVISION OF TITLE [49]"

The Commission approved DP&L's Service Stability Rider ("SSR"), pursuant to 4928.143(B)(2)(d) (Sept. 4, 2013 Opinion and Order, pp. 21-22) (OCC Appx. 31-32), which states:

> "(B) *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) The plan may provide for or include, without limitation, any of the following:
>
> * * *
>
> (d) 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[.]" (Emphasis added)

The "[n]otwithstanding" clause establishes that DP&L's SSR is lawful even if the Court were to conclude that the SSR constitutes a transition charge. Specifically, the sections that bar the recovery of transition costs are R.C. 4928.141(A) and 4928.38. Those sections are not listed as exceptions to the "[n]otwithstanding" clause. DP&L's SSR would thus be lawful even if the Court were to conclude that it was a transition charge.

In the *AEP Case*, the majority of this Court declined to consider whether the "[n]otwithstanding" clause saved AEP's stability charge because "no party appears to have raised

the issue." *In re Application of Columbus S. Power Co.*, Case No. 2013-0521, Slip Op. No. 2016-Ohio-1608, ¶ 38 n.3 (Sup. Ct. Ohio Apr. 21, 2016). Two Justices (O'Connor, C. J. and Lanzinger, J.) dissented and would have remanded the case for the Commission to interpret the "notwithstanding" clause. *Id.* at ¶ 71-79.

In contrast, in this case, the Commission and DP&L both raised the "[n]otwithstanding" argument in their briefs to this Court. Jan. 20, 2015 Second Merit Brief Submitted on Behalf of Appellee, the Public Utilities Commission of Ohio, p. 20; Jan. 20, 2015, Second Merit Brief of Cross-Appellant The Dayton Power and Light Company, pp. 17-18.

The fact that the "[n]otwithstanding" argument was not considered by the Commission in its decision is irrelevant. This Court has "consistently held that a reviewing court *is not authorized to reverse a correct judgment* merely because erroneous reasons were assigned as the basis thereof." *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990) (emphasis added). *Accord*: *State ex rel. Cassels v. Dayton City School Bd. of Edn.*, 69 Ohio St.3d 217, 222, 631 N.E.2d 150 (1994) (*per curiam*) (same).[6]

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[6] That principle is well established in Ohio. In Ohio, "an appellate court *must affirm* a trial court's judgment if there are *any valid grounds* to support it." *Schottenstein, Zox & Dunn, LPA v. C.J. Mahan Constr. Co., LLC*, 10th Dist. Franklin No. 08AP-851, 2009-Ohio-3616, ¶16 (emphasis added). *Accord*: *The Home Savings & Loan Co. v. Avery Place, LLC*, 10th Dist. Franklin Nos. 13AP-777 and 13AP-778, 2014-Ohio-1747, ¶10 ["A]n appellate court *must affirm* the judgment on review *if that judgment is legally correct on other grounds*, as any error is not prejudicial in view of the correct judgment the trial court reached.") (emphasis added); *Camastro v. Motel 6 Operating, L.P.*, 11th Dist. Trumbull No. 2000-T-0053, 2001 Ohio App. LEXIS 1936, at *15 n.8 (Apr. 27, 2001) ("[A] reviewing court passes only upon the correctness of the judgment, not the reasons therefor. Thus, an appellate court *must affirm* a trial court's judgment if upon review, *any valid grounds* are found to support it.") (citation omitted) (emphasis added); *Evans v. Thrasher*, 1st Dist. Hamilton No. C-120783, 2013-Ohio-4776, ¶11; *State v. Eatmon*, 4th Dist. Scioto No. 12CA3498, 2013-Ohio-4812, ¶15; *Aurora Loan Servs. v. Brown*, 12th Dist. Warren Nos. CA2010-01-010 and CA2010-05-041, 2010-Ohio-5426, ¶15; *TP Mechanical*

(footnote cont'd...)

Indeed, it is well-settled that a "statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments." *Dillon v. Farmers Ins. of Columbus, Inc.*, 145 Ohio St.3d 133, 139, 2015-Ohio-5407, 47 N.E.3d 794, ¶ 17 (internal quotation marks and citations omitted). *Accord*: *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18-19 ("[T]he court should avoid that construction which renders a provision meaningless or inoperative.") (internal quotation marks and citation omitted).

In short, unlike the *AEP Case*, the Commission and DP&L raised the "[n]otwithstanding" argument in their briefs in this Court. Although the issue was not considered by the Commission, the interpretation of R.C. 4928.143(B)(2)(d) is a pure question of law, and this Court's precedent establishes that it "is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." *Joyce*, 40 Ohio St.3d at 96. This Court should affirm the Commission's Order approving the recovery of the SSR for DP&L pursuant to R.C. 4928.143(B)(2)(d), because charges authorized under that section are lawful "[n]otwithstanding" the prohibition in other sections against the recovery of transition costs.

(...cont'd)
Contrs., Inc. v. Franklin Cty. Bd. of Commrs., 10th Dist. Franklin No. 09AP-235, 2009-Ohio-3614, ¶12; *Gunton Corp. v. Architectural Concepts*, 8th Dist. Cuyahoga No. 89725, 2008-Ohio-693, ¶9; *Merrill Lynch Mtge. Lending, Inc. v. 1867 W. Mkt., LLC*, 9th Dist. Summit No. 23443, 2007-Ohio-2198, ¶7; *Cook Family Invests. v. Billings*, 9th Dist. Lorain Nos. 05CA008689 and 05CA008691, 2006-Ohio-764, ¶19; *Van Deusen v. Baldwin*, 99 Ohio App.3d 416, 420, 650 N.E.2d 963 (9th Dist. 1994); *Salyer v. Farmers Ins. Co. of Columbus, Inc.*, 10th Dist. Franklin No. 94APE03-313, 1994 Ohio App. LEXIS 4402, at *14 (Sept. 27, 1994); *Cosner v. Babcock & Wilcox Co.*, 92 Ohio App.3d 603, 605 636 N.E.2d 418 (9th Dist. 1993).

B. SECTION 4928.143(B)(2)(d) IS THE LATER-ENACTED STATUTE

1. The Later-Enacted Statute Controls

There is a separate and independent reason that DP&L's SSR does not violate the prohibition (passed in 1999) in R.C. 4928.38 against the recovery of costs that are the "equivalent" of transition costs. Specifically, the Commission authorized DP&L's SSR pursuant to R.C. 4928.143(B)(2)(d). That section was included in Am.Sub.S.B. 221, which was passed in 2008, years after the transition costs statute was enacted.

Section 4928.143(B)(2)(d) was enacted after R.C. 4928.38, and therefore, a stability charge approved under R.C. 4928.143(B)(2)(d) is lawful even if it is equivalent to a transition charge under 4928.38. 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.") (DP&L Appx. 19.) DP&L raised this issue in its Brief before the Commission,[7] and in its Brief before this Court. DP&L Merit Brief, pp. 19-20. This issue also is raised by the Commission and DP&L in their Supplemental Brief, pp. 6-9.

2. Section 4928.141(A) Does Not Bar the Recovery of "Equivalent" Charges

In its Opinion in the *AEP Case*, this Court noted that R.C. 4928.141(A), which was also included in Am.Sub.S.B. 221 (*i.e.*, at the same time as R.C.4928.143(B)(2)(d)), includes a prohibition against the recovery of "'previously authorized allowances for transition costs.'" *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, at ¶17 (quoting R.C. 4928.141(A)). That section does not change the analysis in the immediately preceding section of this

[7] May 20, 2013 The Dayton Power and Light Company's Initial Post-Hearing Brief (Public Version), p. 46 (Case No. 12-426-EL-SSO) available at http://dis.puc.state.oh.us/TiffToPDf/A1001001A13E20B55317E63086.pdf.

Memorandum because the term "transition cost" is defined by statute, and DP&L's SSR does not satisfy the statutory definition.

Specifically, transition costs are defined by statute as *historic* costs that a utility incurred in the *past* (generally, costs of constructing generation plants). R.C. 4928.39(A) ("The costs *were* prudently incurred.") (emphasis added); R.C. 4928.39(B) ("The costs *are* legitimate, net, *verifiable*, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.") (emphasis added); *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, at ¶22.

In contrast, DP&L's SSR was set at an amount to allow DP&L to provide stable retail electric service in the *future*. Sept. 4, 2013 Opinion and Order, pp. 21-22, 25-26 (OCC Appx. 31-32, 35-36). The SSR amount was set based upon *forecasts* of DP&L's *future* revenues and expenses. Mar. 19, 2014 Second Entry on Rehearing, pp. 9-10 (OCC Appx. 76-77). Therefore, the SSR does not recover "transition costs," as defined by statute, since the SSR is forward-looking.

AEP's RSR was also based on projections of future revenues and expenses. *In Re Application of Columbus S. Power Co.*, 2016-Ohio-1608, at ¶24. In its decision in the *AEP Case*, this Court nevertheless held that AEP's RSR recovered the "equivalent" of transition costs, and that AEP's RSR was thus barred by R.C. 4928.38. *Id.* at ¶25. As demonstrated in the immediately-preceding section of this Memorandum, the statutory bar against recovering the "equivalent" of transition costs in R.C. 4928.38 should not bar DP&L's recovery of the SSR, because DP&L has raised the argument that R.C. 4928.143(B)(2)(d) is the later-enacted statute.

Section 4928.141(A) does not bar the recovery of costs that are the "equivalent" of transition costs. Instead, R.C. 4928.141(A) bars the recovery only of "transition costs." Since the SSR is forward-looking, it does not satisfy the statutory definition of transition costs, and it is not barred by 4928.141(A).

That conclusion – that the equivalent of transition costs can be recovered through R.C. 4928.143(B)(2)(d), and the recovery is not barred by R.C. 4928.141(A) – is consistent with the structure of Am.Sub.S.B. 221. Specifically, when the General Assembly partially re-regulated the generation market in 2008, it authorized utilities to recover charges to allow them to provide stable "retail electric service" (including generation service) through R.C. 4928.143(B)(2)(d). Such a charge will necessarily be forward-looking. The General Assembly continued the prohibition against the recovery of transition costs (*i.e.*, historic costs of constructing generation plants) in R.C. 4928.141(A), but authorized charges to stabilize the generation market on a forward-looking basis in R.C. 4928.143(B)(2)(d).

In short, the SSR is recoverable under R.C. 4928.143(B)(2)(d), and the bar against the recovery of costs that are the "equivalent" of transition costs in R.C. 4928.38 is inapplicable because R.C. 4928.143(B)(2)(d) is the later-enacted statute. Further, the SSR is forward-looking and does not satisfy the statutory definition of a "transition cost"; the bar to recovering transition costs in R.C. 4928.141(A) is thus inapplicable.

These arguments were not raised by the parties in the *AEP Case* and, therefore, were not considered by the Court. That procedural deficiency is not present here and should not control the fate of DP&L's SSR. Instead, as the Commission and DP&L have raised these significant statutory issues, the Court should rule on this appeal after considering them.

IV. JOINT MOVANTS INVITE PIECEMEAL APPEALS

The Joint Motion also should be denied for the separate and independent reason that it invites piecemeal appeals from the Commission. Without citing any authority, Joint Movants ask the Court (p. 12) to split this appeal in two, by (1) accepting their propositions of law relating to the SSR, while (2) requiring parties to raise their remaining propositions of law on another – unspecified – day.

The Joint Motion is yet another iteration of the Joint Movants' attempts to stop the SSR outside the ordinary course of appeals from the Commission. May 6, 2014 Complaint for Writs of Prohibition and Mandamus, Case No. 2014-0711 (dismissed by this Court on Oct. 22, 2014); Oct. 14, 2014 Joint Motion for a Stay by Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (denied by this Court on Feb. 18, 2015); June 8, 2015 Motion to Expedite Ruling on Appeal by the Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel (denied by this Court on July 22, 2015).

Such a maneuver is not contemplated by R.C. 4903.11 through 4903.13, which govern exclusively the Court's jurisdiction in appeals from the Commission. Ohio Constitution, Article IV, Section 2(B)(2)(d) (granting the Court "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law*") (emphasis added). Moreover, this course would be inconsistent with the Court's "disfavor of piecemeal appeals arising from commission proceedings." *Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 368-69, 588 N.E.2d 775 (1992) (per curiam), citing *Toledo Edison Co. v. Pub. Util. Comm.*, 5 Ohio St.3d 95, 449 N.E.2d 428 (1983) (per curiam) and *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 533 N.E.2d 353 (1988) (per curiam)). Instead of splitting this appeal

in two, the Court should proceed with oral argument, and issue a decision in due course on the merits of this appeal.

V. CONCLUSION

For each of these reasons, the Court should deny the May 12, 2016 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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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of the Public Utilities Commission of Ohio and The Dayton Power and Light Company in Opposition to Joint Motion of 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 has been served via electronic mail, upon the following counsel of record, this 18th day of May, 2016:

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