

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, :
Public Utilities Commission of Ohio, :
Appellee. :
:
:
:

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO TO THE MOTION OF THE PUBLIC UTILITIES
COMMISSION OF OHIO AND THE DAYTON POWER AND LIGHT COMPANY FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF**

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

**COUNSEL FOR APPELLANT/CROSS-
APPELLEE, INDUSTRIAL ENERGY
USERS-OHIO**

Bruce J. Weston (Reg. No. 0016973)

Ohio Consumers' Counsel

Maureen R. Willis (Reg. No. 0020847)

(Counsel of Record)

Terry L. Etter (Reg. No. 0067445)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

Telephone: (614) 466-9567 (Grady)

Facsimile: (614) 466-9475

maureen.willis@occ.ohio.gov

terry.etter@occ.ohio.gov

**COUNSEL FOR APPELLANT/CROSS-
APPELLEE, THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL**

Judi L. Sobecki (Reg. No. 0067186)

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, OH 45432

Telephone: (937) 259-7171

Facsimile: (937) 259-7178

Judi.sobecki@dplinc.com

Charles J. Faruki (Reg. No. 0010417)

(Counsel of Record)

Jeffrey S. Sharkey (Reg. No. 0067892)

Faruki Ireland & Cox P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3700

Facsimile: (937) 227-3717

cfaruki@ficlaw.com

jsharkey@ficlaw.com

**COUNSEL FOR APPELLEE/CROSS-
APPELLANT, THE DAYTON POWER
AND LIGHT COMPANY**

Michael DeWine (Reg. No. 0009181)

Attorney General of Ohio

William L. Wright (Reg. No. 0018010)

Section Chief, Public Utilities Section

(Counsel of Record)

Thomas McNamee (Reg. No. 0017352)

Werner L. Margard (Reg. No. 0024858)

Assistant Attorneys General

Public Utilities Section

30 East Broad Street, 16th Floor

Columbus, OH 43215

Telephone: (614) 466-4395

Facsimile: (614) 644-8764

william.wright@ohioattorneygeneral.gov

Thomas.mcnamee@ohioattorneygeneral.gov

mwnerner.margard@ohioattorneygeneral.gov

**COUNSEL FOR APPELLEE,
PUBLIC UTILITIES COMMISSION OF
OHIO**

Colleen L. Mooney (Reg. No. 0015668)
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
Facsimile: (419) 425-8862
cmooney@ohiopartners.org

**COUNSEL FOR AMICUS CURIAE,
OHIO PARTNERS FOR AFFORDABLE
ENERGY**

Ellis Jacobs (Reg. No. 0017435)
Advocates for Basic Legal Equality, Inc.
130 W. Second Street, Suite 700 East
Dayton, OH 45402
Telephone: (937) 535-4419
Facsimile: (937) 535-4600
ejacobs@ablelaw.org

**COUNSEL FOR AMICUS CURIAE,
EDGEMONT NEIGHBORHOOD
COALITION**

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.	: : :	
Public Utilities Commission of Ohio, Appellee.	: : : : :	

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO TO THE MOTION OF THE PUBLIC UTILITIES
COMMISSION OF OHIO AND THE DAYTON POWER AND LIGHT COMPANY FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF**

I. INTRODUCTION

 Claiming that they should be permitted to address the effects of the Court’s decision in *In re Application of Columbus S. Power Co.*, Case No. 2013-521, Slip Op. 2016-Ohio-1608 (Apr.

21, 2016) (“*Columbus Southern*”), the Public Utilities Commission of Ohio (“Commission”) and the Dayton Power and Light Company (“DP&L”) filed a motion seeking leave to file a supplemental brief on May 13, 2016 (“Motion”). Because the filing of a supplemental brief violates the Court’s Rules of Practice, the Court should deny the Motion. If the Court nonetheless grants the Motion, Industrial Energy Users-Ohio (“IEU-Ohio”) requests that the Court also accept for filing the Reply of Industrial Energy Users-Ohio to the Supplemental Brief, attached as Attachment A.

II. THE MOTION SEEKS TO ADDRESS ISSUES PREVIOUSLY ADDRESSED BY THE COMMISSION AND DP&L IN THEIR MERIT BRIEFS

The briefing in this case concluded on March 31, 2015 when DP&L filed its fourth brief. The case is set for oral argument on June 14, 2016.

On April 21, 2016, the Court issued its decision in *Columbus Southern*. In the *Columbus Southern* case, the Court addressed the Commission’s authorization of a charge, the Retail Stability Rider or RSR, to collect \$508 million on a nonbypassable basis. Customers appealed the Commission’s decision to authorize the RSR on the ground that the charge permitted AEP-Ohio to unlawfully bill and collect transition revenue or its equivalent. The Court agreed and reversed and remanded the case to the Commission.

In its decision, the Court determined that R.C. 4928.38 barred a charge that would collect transition revenue or its equivalent. As the Court explained, “[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 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 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 “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 charge "recovers the equivalent of transition revenue" *Id.* at ¶ 25.

The Court also rejected the Commission's claim that AEP-Ohio's charge did not recover 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 [in R.C. 4928.38],' 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.

In the ESP case for DP&L that is before the Court in this appeal, the Commission authorized a charge for DP&L, the Service Stability Rider or SSR, that permitted it to bill customers \$110 million annually. Like AEP-Ohio's RSR, DP&L's SSR was designed to permit DP&L to bill and collect revenue that would otherwise have been lost due to shopping and low wholesale energy and capacity prices. In approving the charge, the Commission (and DP&L) relied extensively on the now-rejected reasoning the Commission used to authorize the \$508 million charge for AEP-Ohio.

The appellants, Industrial Energy Users-Ohio and the Office of the Ohio Consumers' Counsel, appealed the orders authorizing the charge in the case below on the ground that the authorization of the charge, like the one that this Court recently reversed in *Columbus Southern*, permits DP&L to collect transition revenue or its equivalent. See First Merit Brief of Appellant

Industrial Energy Users-Ohio at 15-20 (Dec. 1, 2014). In their merit briefs, DP&L and the Commission each argued that the Commission could authorize a rider as a term of an electric security plan that permitted the recovery of transition revenue or its equivalent because an electric security plan could include terms “notwithstanding” other prohibitions contained in Chapter 4928 including the prohibition on transition revenue and unlawful subsidies. See Second Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio at 20 (Jan. 20, 2015); Brief of Cross-Appellant The Dayton Power and Light Company at 17-18 (Jan. 20, 2015) (“DP&L Merit Brief”). DP&L further argued that the provision authorizing a stability charge as a term of an electric security plan should be given effect even if it conflicted with the prohibition on the authorization of recovery of transition revenue or its equivalent because the electric security plan statute was the later adopted statute. DP&L Merit Brief at 19-20. In its Third Merit Brief, IEU-Ohio responded that these issues were not properly before the Court because the Commission did not rely on them to support its order authorizing the SSR and the arguments were without merit. Third Merit Brief of Appellant/Cross-Appellee Industrial Energy Users-Ohio at 17-29 (Mar. 11, 2015).

After the Court issued its decision in *Columbus Southern* and in compliance with S. Ct. R. Prac. 17.08, IEU-Ohio and OCC have filed notices of additional authority that they may include the *Columbus Southern* decision in their oral arguments with the Court. Additionally, OCC and IEU-Ohio have filed a joint motion seeking an order from the Court vacating the Commission’s authorization of the SSR and remanding the case to the Commission for order terminating the authorization of the RSR so that customers no longer are required to pay unlawful transition charges of \$110 million annually. 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 (May 12, 2016).

On May 13, 2016, the Commission and DP&L filed their motion seeking to reopen briefing of the case in light of the Court's decision in *Columbus Southern*. Without any discussion of the Court's Rules of Practice, they justify this request on the ground that the Court has permitted supplemental briefing when there is a change of law or circumstance, citing a court entry in *State, ex rel. The Cincinnati Enquirer v. Jones-Kelly*, Case No. 2006-2239 (Feb. 28, 2008). Motion at 2.¹

The Commission and DP&L have also submitted the Supplemental Brief they are asking the Court to accept. In their Supplemental Brief, they repeat the arguments they made in their merit briefs that the transition charge may be lawfully authorized as a term of the ESP "notwithstanding" the prohibition on the authorization of the recovery of transition revenue or its equivalent and that the Court should ignore the bar on authorization of transition revenue or its equivalent because the section authorizing a stability charge was adopted after the statutory prohibition. Motion, Exhibit A at 3-9.

III. THE COURT SHOULD DENY THE MOTION BECAUSE IT VIOLATES THE COURT'S RULES OF PRACTICE

Rule 16.08 of the Court's Rules of Practice provides, "Except as provided in S.Ct.Prac.R. 3.13 and S.Ct.Prac.R. 17.08 and 17.09, *merit briefs shall not be supplemented. If a relevant authority is issued after the deadline has passed for filing a party's merit brief, that party may file a citation to the relevant authority but shall not file additional argument.*" (Emphasis

¹ Further, they wish to inform the Court that DP&L's appeal of a schedule to blend existing generation rates and those produced through an auction process ordered by the Commission is now moot. A notice withdrawing the assignment of error would have sufficed, but that part of the Motion is not significant.

added.) Under the current Rules of Practice, therefore, supplemental briefs are generally barred unless a party demonstrates that an exception applies or is filing a notice of additional authority.

In this instance, none of the exceptions to the general prohibition found in Rule 16.08 provides legal authority to grant the Motion.

The exception to the bar on supplemental briefing set out in Rule 3.13 permits a party to correct or add to a brief, but only if “[t]he revised document [is] filed within the time permitted by these rules for filing the original document.” S.Ct. R. Prac. 3.13(B). The last opportunity for the Commission and DP&L to file under this exception passed long ago. Therefore, this exception does not permit the filing of the Supplemental Brief.

The exception in Rules 16.08 and 17.08 provides that a party prior to oral argument may file a list of authorities not contained in its brief that the party indicates it may rely upon at oral argument.² Exhibit A attached to the Motion, however, is in fact a brief, not a list of additional authorities, and as noted above, the Commission and DP&L claim that they wish to file an additional *brief* to advance arguments about the effect of the Court’s decision in *Columbus Southern* on arguments that both the Commission and DP&L made in their merit briefs. Because they are explicitly asking to provide much more than a list of authorities they intend to rely upon at oral argument, Rules 16.08 and 17.08 do not provide a legal basis for granting the Motion.

Finally, the exception in Rule 17.09 prohibits any supplemental brief after oral argument unless the Court grants permission to file the brief, and “if a relevant authority is issued after oral argument, a party may file a citation to the relevant authority *but shall not file additional argument.*” S.Ct. R. Prac. 17.09 (emphasis added). Oral argument, however, is set for this case on June 14, 2016 if the Court does not grant the motion to vacate and remand the Commission’s

² S.Ct. R. Prac. 17.08 provides, “A party who intends to rely during oral argument on authorities not cited in the merit briefs shall file a list of citations to those authorities no later than seven days before the date of the oral argument.”

orders that IEU-Ohio and OCC filed on May 12, 2016. Accordingly, this exception to the general prohibition on the filing of supplemental briefs is inapplicable as well.

In summary, the Rule 16.08 generally prohibits the filing of a supplemental brief after the time for the original briefing has passed unless an exception applies. In this instance, none of the exceptions provides a valid ground for granting the Motion of the Commission and DP&L for leave to file the Supplemental Brief. Therefore, the Court should deny the Motion based on the Court's Rules of Practice

IV. THE COURT SHOULD DENY THE MOTION BECAUSE A SUPPLEMENTAL BRIEF IS NOT PERMITTED ON THE AUTHORITY OF THE COURT'S ENTRY IN JONES-KELLY

In their Motion, the Commission and DP&L fail to even acknowledge the Court's general prohibition on the filing of supplemental briefs and instead state the Court should grant the Motion because there has been a change of law or circumstance, citing a Court entry permitting a post-argument brief in *Jones-Kelly*. Motion at 2. The reliance on the entry in *Jones-Kelly* is unwarranted because *Jones-Kelly* was decided based on a prior Court rule that would be inapplicable to this Motion and the circumstances under which the Court granted the motion in *Jones-Kelly* are absent in this case.

Jones-Kelly was an original action seeking an order of mandamus filed by the Cincinnati *Enquirer* on December 5, 2006. *State ex rel. The Cincinnati Enquirer, a Division of Gannett Satellite Network, Inc. v. Barbara Riley [Helen Jones-Kelley], Director, Ohio Department of Job and Family Services*, Sup. Ct. Case No. 2006-2239, Complaint (Dec. 5, 2006). The *Enquirer* sued seeking an order directing the Department of Job and Family Services to turn over records after the Department refused a reporter's requests under Ohio's public records law. *Id.* After parties submitted evidence and briefs, the Court conducted an oral argument on January 8, 2008. *Id.*, Notice that Oral Argument Was Held (Jan. 8, 2008). On February 13, 2008, after oral

argument but prior to the Court's decision, the Governor signed legislation revising the statutes at issue in the case. Due to the change of law, counsel for the respondent requested that parties be permitted to file supplemental briefs pursuant to Rule IX, section 9, of the Court's former rules of practice. *Id.*, Motion for Leave to File Supplemental Brief (Feb. 19, 2008). Former Rule IX, section 9 provided, "Unless ordered by the Supreme Court, the parties shall not tender for filing and the Clerk shall not file any additional briefs or other materials relating to the merits of the case after the case has been orally argued. If a relevant authority is issued after oral argument, a party may file a citation to the relevant authority but shall not file additional argument." The Court granted the motion in the February 28, 2008 Entry and permitted the parties to file supplemental briefs on the effect of the statutory amendments signed by the Governor. *Id.*, Entry (Feb. 28, 2008).

As is evident from a full statement of the facts, the *Jones-Kelly* entry does not support granting the Motion in this case.

First, there has not been a change in law that would warrant the allowance of the Motion. In *Jones-Kelly*, the respondent noted that new legislation had been signed by the Governor that amended the statutes at issue in the case. Thus, there was a clear change in law. The Court in *Columbus Southern*, however, addressed statutes enacted in 1999 and 2008, and there has been no intervening change in law since the Court issued its decision in *Columbus Southern*. The only thing that has changed since the parties completed briefing this case is that the Court has rejected the specious reasoning of the Commission to justify authorizing AEP-Ohio (and DP&L) to bill and collect transition revenue or its equivalent in violation of the prohibition of such authorization contained in R.C. 4928.38.

Second, former Rule IX, section 9, like current Supreme Court Rule of Practice 17.09, applied only to requests to file supplemental briefs after oral argument. As this case is set for oral argument on June 14, 2016, former Rule IX, section 9 would not have provided authority to grant a motion to file a supplemental brief.

In fact, the prior Rules of Practice would have prohibited the filing of the Supplemental Brief just as the current rules do. The Court's prior Rules of Practice stated, "Except as provided in S.Ct. Prac. R. VIII, Section 7 and S.Ct. Prac. R. IX, Sections 8 and 9, merit briefs shall not be supplemented. If a relevant authority is issued after the deadline has passed for filing a party's merit brief, that party may file a citation to the relevant authority but shall not file additional argument." As under the current Rules of Practice, the exceptions in the prior rule permitted the filing of a brief with corrections or additions but only within the time period permitted for the original filing (Rule VIII, section 7), the filing of additional authority prior to oral argument (Rule IX, section 8), and the filing of a supplemental brief after oral argument with Court permission (Rule IX, section 9). Thus, if the Court applied the rules in place at the time *Jones-Kelly* was decided to the Motion, the Commission and DP&L would fare no better than they do under the current Rules.

V. **ON THE MERITS, THE COMMISSION AND DP&L DO NOT PROVIDE A REASONED BASIS FOR GRANTING THEIR MOTION**

In addition to failing to provide legal support for their Motion, the Commission and DP&L also fail to demonstrate any need to file a supplemental brief. According to the Commission and DP&L, the Court should grant the Motion because the Court in *Columbus Southern* did not address two arguments the Commission and DP&L raise in their merit briefs in this case. Motion at 2. That statement, however, begs the question why a supplemental brief is necessary. Since the Commission and DP&L have presented the arguments they wish to make in

their initial briefs, then those arguments are already before the Court and there is no need for the Supplemental Brief.³

Moreover, a comparison of the Supplemental Brief filed with the Motion and the merit briefs of the Commission and DP&L confirm that the supplemental brief adds nothing for the Court's consideration. *Compare* Supplemental Brief at 3-9 *with* Commission Merit Brief at 20 and DP&L Merit Brief at 17-18 (presenting the claim that the Commission may ignore prohibitions on transition revenue and subsidies contained Chapter 4928 based on the "notwithstanding" clause in 4928.143(B)) and DP&L Merit Brief at 19-20 (Commission can ignore the prohibition on transition revenue in R.C. 4928.38 because R.C. 4928.143(B)(2)(d) was a later-enacted statute). The Motion's suggestion that the supplemental brief will provide some new insight into the lawfulness of the authorization of transition revenue is unsupported.

VI. IF THE MOTION IS GRANTED, IEU-OHIO TENDERS ITS REPLY

As discussed above, the Motion should not be granted because the Court's Rules of Practice prohibit the filing of a supplemental brief at this stage of the case. If the Court nonetheless grants the Motion, IEU-Ohio requests that it not be required to file a motion seeking leave to file a reply to the Supplemental Brief because the Commission and DP&L have no objection to such a reply brief. Motion at 3. A copy of IEU-Ohio's Reply to the Supplemental Brief is attached as Attachment A.

VII. CONCLUSION

The Motion seeking leave to file a supplemental brief by the Commission and DP&L does not acknowledge the Court's Rules of Practice or provide a ground for granting the motion that meets one of the exceptions to the Court's general prohibition of supplemental briefs.

³ Although the Commission and DP&L have previously presented these arguments to the Court, they are not properly before the Court and are without merit, as IEU-Ohio demonstrated in its Third Merit Brief at 17-29.

Instead, the Commission and DP&L rely on a citation to a 2008 Court entry, but the facts and circumstances under which the Court permitted the filing of supplemental briefs in that case are distinguishable. Moreover, the Supplemental Brief that the Commission and DP&L have tendered adds nothing to the Court's understanding of the lawfulness of the SSR; the Supplemental Brief merely repeats the same arguments that the Commission and DP&L improperly advanced in their merit briefs. The only effect of this Motion has been to provoke IEU-Ohio into drafting a response to an unsupported Motion and another response to arguments IEU-Ohio previously addressed in its Third Merit Brief. Like the Commission's authorization of DP&L's rider to collect transition revenue or its equivalent, this Motion is a poor use of the limited resources of customers and this Court and should be denied.

Respectfully submitted,

/s/ Frank P. Darr

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

**Counsel for Appellant/Cross-Appellee
Industrial Energy Users-Ohio**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio to the Motion of the Public Utilities Commission of Ohio and the Dayton Power and Light Company for Leave to File a Supplemental Brief and Attachment A: Reply of Appellant/Cross Appellee Industrial Energy Users-Ohio to the Supplemental Brief of Appellee the Public Utilities Commission of Ohio and Cross-Appellant/Appellee The Dayton Power and Light Company* was served upon the parties of record *via* electronic transmission this 23rd day of May 2016.

/s/ Frank P. Darr

Frank P. Darr

**Counsel for Appellant/Cross-Appellee
Industrial Energy Users-Ohio**

Judi L. Sobecki (Reg. No. 0067186)
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, OH 45432
Telephone: (937) 259-7171
Facsimile: (937) 259-7178
Judi.sobecki@dplinc.com

Charles J. Faruki (Reg. No. 0010417)
(Counsel of Record)
Jeffrey S. Sharkey (Reg. No. 0067892)
Faruki Ireland & Cox P.L.L.
110 North Main Street, Suite 1600
Dayton, OH 45402
Telephone: (937) 227-3700
Facsimile: (937) 227-3717
cfaruki@ficlaw.com
jsharkey@ficlaw.com

**COUNSEL FOR APPELLEE/CROSS-
APPELLANT, THE DAYTON POWER
AND LIGHT COMPANY**

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
(Counsel of Record)

Thomas McNamee (Reg. No. 0017352)
Werner L. Margard (Reg. No. 0024858)
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
Telephone: (614) 466-4395
Facsimile: (614) 644-8764
william.wright@ohioattorneygeneral.gov
Thomas.mcnamee@ohioattorneygeneral.gov
mwerner.margard@ohioattorneygeneral.gov

**COUNSEL FOR APPELLEE,
PUBLIC UTILITIES COMMISSION OF
OHIO**

Colleen L. Mooney (Reg. No. 0015668)
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
Facsimile: (419) 425-8862
cmooney@ohiopartners.org

**COUNSEL FOR AMICUS CURIAE,
OHIO PARTNERS FOR AFFORDABLE ENERGY**

Ellis Jacobs (Reg. No. 0017435)
Advocates for Basic Legal Equality, Inc.
130 W. Second Street, Suite 700 East
Dayton, OH 45402
Telephone: (937) 535-4419
Facsimile: (937) 535-4600
ejacobs@ablelaw.org

**COUNSEL FOR AMICUS CURIAE,
EDGEMONT NEIGHBORHOOD COALITION**

ATTACHMENT A

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.	: : :	
Public Utilities Commission of Ohio,	: : :	
Appellee.	: : :	

**REPLY OF APPELLANT/CROSS-APPELLEE INDUSTRIAL ENERGY USERS-OHIO
TO THE SUPPLEMENTAL BRIEF OF APPELLEE THE PUBLIC UTILITIES
COMMISSION OF OHIO AND APPELLEE/CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY**

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

**COUNSEL FOR APPELLANT/CROSS-
APPELLEE, INDUSTRIAL ENERGY
USERS-OHIO**

Bruce J. Weston (Reg. No. 0016973)

Ohio Consumers' Counsel

Maureen R. Willis (Reg. No. 0020847)

(Counsel of Record)

Terry L. Etter (Reg. No. 0067445)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, OH 43215-3485

Telephone: (614) 466-9567 (Grady)

Facsimile: (614) 466-9475

maureen.willis@occ.ohio.gov

terry.etter@occ.ohio.gov

**COUNSEL FOR APPELLANT/CROSS-
APPELLEE, THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL**

Judi L. Sobecki (Reg. No. 0067186)

The Dayton Power and Light Company

1065 Woodman Drive

Dayton, OH 45432

Telephone: (937) 259-7171

Facsimile: (937) 259-7178

Judi.sobecki@dplinc.com

Charles J. Faruki (Reg. No. 0010417)

(Counsel of Record)

Jeffrey S. Sharkey (Reg. No. 0067892)

Faruki Ireland & Cox P.L.L.

110 North Main Street, Suite 1600

Dayton, OH 45402

Telephone: (937) 227-3700

Facsimile: (937) 227-3717

cfaruki@ficlaw.com

jsharkey@ficlaw.com

**COUNSEL FOR APPELLEE/CROSS-
APPELLANT, THE DAYTON POWER
AND LIGHT COMPANY**

Michael DeWine (Reg. No. 0009181)

Attorney General of Ohio

William L. Wright (Reg. No. 0018010)

Section Chief, Public Utilities Section

(Counsel of Record)

Thomas McNamee (Reg. No. 0017352)

Werner L. Margard (Reg. No. 0024858)

Assistant Attorneys General

Public Utilities Section

30 East Broad Street, 16th Floor

Columbus, OH 43215

Telephone: (614) 466-4395

Facsimile: (614) 644-8764

william.wright@ohioattorneygeneral.gov

Thomas.mcnamee@ohioattorneygeneral.gov

mwnerner.margard@ohioattorneygeneral.gov

**COUNSEL FOR APPELLEE,
PUBLIC UTILITIES COMMISSION OF
OHIO**

Colleen L. Mooney (Reg. No. 0015668)
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
Facsimile: (419) 425-8862
cmooney@ohiopartners.org

**COUNSEL FOR AMICUS CURIAE,
OHIO PARTNERS FOR AFFORDABLE
ENERGY**

Ellis Jacobs (Reg. No. 0017435)
Advocates for Basic Legal Equality, Inc.
130 W. Second Street, Suite 700 East
Dayton, OH 45402
Telephone: (937) 535-4419
Facsimile: (937) 535-4600
ejacobs@ablelaw.org

**COUNSEL FOR AMICUS CURIAE,
EDGEMONT NEIGHBORHOOD
COALITION**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. ARGUMENT	4
A. The Commission’s order authorizing the Service Stability Rider is unlawful because it authorizes DP&L to bill and collect transition revenue or its equivalent in violation of R.C. 4928.38 and R.C. 4928.14.....	5
B. The claim that the SSR is unrelated to historic costs and therefore cannot constitute transition costs is meritless.....	10
C. The statutory interpretation of the effect of the “notwithstanding” clause in R.C. 4928.143(B)(2) presented in the Merit and Supplemental Briefs of the Commission and DP&L is not properly before the Court, is premised on an incorrect statutory construction of R.C. 4928.143(B)(2)(d), and is not supported by legislative intent and the Commission’s interpretation of the section and other sections of Chapter 4928	13
1. The argument that the Commission may ignore the prohibition of the authorization of transition revenue or its equivalent when authorizing a charge under R.C. 4928.143(B)(2) should be rejected because it was not relied upon by the Commission in its orders	13
2. The claim that there is a conflict between R.C. 4928.143(B)(2)(d) and 4928.38 should be rejected because R.C. 4928.143(B)(2)(d) does not authorize the billing and collection of transition charges.....	15
3. The claim that the Commission may authorize the recovery of transition revenue or its equivalent under R.C. 4928.143	

notwithstanding the prohibition in R.C. 4928.38 and 4928.141 should be rejected because it is not supported by legislative intent or the Commission’s prior, simultaneous, and subsequent interpretation and application of the regulatory structure applicable to electric distribution utilities.16

4. The claim that the Commission may authorize transition revenue or its equivalent by resolving an alleged conflict under R.C. 1.52 should be rejected because there is no conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38.....21

III. CONCLUSION..... 22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Columbus-Suburban Coach Lines v. Pub. Util. Comm.</i> , 20 Ohio St.2d 125, 127, 254 N.E. 2d 8 (1969).....	21
<i>Elyria Foundry Co. v. Pub. Util. Comm.</i> , 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48.....	17
<i>In re Application of Columbus S. Power Co.</i> , Slip Op. No. 2016-Ohio-1608 (Apr. 21, 2016) (“ <i>Columbus Southern</i> ”)	2, 3, 5, 6, 8, 9, 10, 11, 15, 17, 19, 22
<i>In re Commission Review of Capacity Charges of Ohio Power Co.</i> , Slip Op. No. 2016-Ohio-1607 (Apr. 21, 2016) (“ <i>Capacity Charge Case</i> ”).....	2, 3
<i>Jones Metal Products Co. v. Walker</i> , 29 Ohio St.2d 173, 181 (1972).....	19
<i>Kewalo Ocean Activities and Kahala Catamarans v. Ching</i> , 243 P.3d 273 (2010).....	16
<i>Ohio Neighborhood Finance, Inc. v. Scott</i> , 139 Ohio St.3d 536, 2014-Ohio-2440	16
<i>State v. Brown</i> , 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (<i>quoting State v. Cook</i> , 83 Ohio St.3d 404, (1998))	16
<i>State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections</i> , 65 Ohio St.3d 175, 177 (1992)15	
<i>State ex rel. Ohio Civil Serv. Emp. Assn., AFSCME, Local 11, AFL–CIO v. State Emp. Relations Bd.</i> , 104 Ohio St.3d 122, 2004–Ohio–6363.....	15
<i>State ex rel. PIA Psychiatric Hosps., Inc. v. Ohio Certificate of Need Review Bd.</i> , 60 Ohio St.3d 11, 17, fn. 4 (1991)	15
<i>State ex rel. Quarto Mining Co. v. Foreman</i> , 79 Ohio St.3d 78, 81 (1997)	15
<i>Wachendorf v. Shaver</i> , 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948).....	21
<i>Yates v. U.S.</i> , 574 U.S. ___, 2015 WL 773330 at *6 (<i>quoting Robinson v. Shell Oil Co.</i> , 519 U.S. 337, 341 (1997))	16

Other Authorities

<i>In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan</i> , Case No. 12-426-EL-SSO, et al., Opinion and Order at 22 (Sept. 4, 2013).....	5, 6, 8, 9, 10, 13, 14, 19
---	----------------------------

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, Case No. 12-426-EL-SSO, et al., Entry Nunc Pro Tunc (Sept. 6, 2013).....6, 14

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, Case No. 10-1454-EL-RDR, Finding and Order at 7, 17-18 (Jan. 11, 2012)19

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Case No. 13-2385-EL-SSO, et al., Opinion and Order at 7, 26, 65, 69, 91, 95 (Feb. 25, 2015)20

Statutes

Ohio Revised Code

R.C. 4928.02(H).....17, 18, 20, 22

R.C. 4928.0618

R.C. 4928.10(D)(3).....20

R.C. 4928.1718, 19

R.C. 4928.383, 4, 5, 6, 10, 11, 14, 16, 18, 19, 21

R.C. 4928.3911

R.C. 4928.4011, 19

R.C. 4928.1413, 5, 10, 14, 16, 17, 18, 20, 21, 22

R.C. 4928.14217

R.C. 4928.1434, 14, 16, 17, 21

R.C. 4928.143(B)(2)4, 13, 14, 16, 17, 19, 20, 22

R.C. 4928.143(B)(2)(d).....2, 3, 4, 5, 10, 13, 15, 16, 19, 20, 21, 22

Ohio Administrative Code

Rule 4901:1-37-04(C)(2)19

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,
12-428-EL-AAM,

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

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. :

**REPLY OF APPELLANT/CROSS-APPELLEE INDUSTRIAL ENERGY USERS-OHIO
TO THE SUPPLEMENTAL BRIEF OF APPELLEE THE PUBLIC UTILITIES
COMMISSION OF OHIO AND APPELLEE/CROSS-APPELLANT
THE DAYTON POWER AND LIGHT COMPANY**

I. INTRODUCTION

On April 21, 2016, the Court held that the Public Utilities Commission of Ohio (“Commission”) erred when it authorized the Columbus Southern Power Company and the Ohio Power Company to bill and collect transition revenue or its equivalent under the guise of R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.*, Slip Op. No. 2016-Ohio-1608 ¶¶ 14-40 (Apr. 21, 2016) (“*Columbus Southern*”). Finding that the Commission had authorized an over-recovery as a result of its error permitting AEP-Ohio to bill and collect transition revenue or its equivalent, the Court remanded the case to the Commission so that the Commission could determine the amount unlawfully collected and determine the balance of deferred capacity costs that the electric utility may properly collect.¹

¹ The over-recovery occurred because the Commission authorized transition revenue and at the same time assigned the recovery of a portion of wholesale capacity prices to retail customers. The authorization of a wholesale capacity price and its recovery was addressed in part in a separate decision. In that separate decision, the Court affirmed that the Commission could authorize a price for wholesale capacity service for Ohio Power Company (“AEP-Ohio”), but remanded that case to allow the Commission to support its findings as to the price. *In re Commission Review of Capacity Charges of Ohio Power Co.*, Slip Op. No. 2016-Ohio-1607 (Apr. 21, 2016) (“*Capacity Charge Case*”).

The *Capacity Charge Case* and *Columbus Southern* presented an issue not present in the case below. At the time the Commission authorized a price for wholesale capacity in the *Capacity Charge Case*, AEP affiliates operating in the eastern region of the AEP system provided capacity service under the relevant federally-approved transmission tariff to all load serving entities including those entities serving customers that contracted for retail electric generation service through a competitive retail electric service provider in Ohio. In the terminology of the transmission operator, PJM Interconnection LLC (“PJM”), the Commission treated AEP-Ohio as a Fixed Resource Requirements Entity (“FRR Entity”) and subject to special rules for the pricing of wholesale capacity service. Among the options for an FRR Entity is the use of a “state compensation mechanism” or a default price set through PJM wholesale capacity auctions. During the period involved in the *Capacity Charge Case*, the wholesale price set by PJM was substantially lower than what AEP-Ohio claimed was its “cost” of capacity. In the Commission’s order approving the price for capacity under the state compensation mechanism, the Commission set the price of capacity used by competitive retail electric service providers under the state compensation mechanism at \$188.88 per megawatt-day, but directed AEP-Ohio to bill competitive retail electric service providers the price set by PJM through the competitive bid process. The Commission authorized AEP-Ohio to defer the difference between

On May 13, 2016, the Commission and DP&L moved for an order permitting them to file a Supplemental Brief to address the effect of the *Columbus Southern* decision on this appeal.² In a Supplemental Brief, they advance several, often contradictory, arguments that are without merit.

First, they argue that the Court in *Columbus Southern* affirmed the Commission's authority to authorize the recovery of a stability charge such as the SSR. Supplemental Brief at 3. The decision in *Columbus Southern*, however, rejects the Commission's decision to authorize the billing and collection of transition revenue or its equivalent in violation of R.C. 4928.38 and R.C. 4928.141 under the guise of R.C. 4928.143(B)(2)(d).

Second, they argue that the prohibition of transition revenue or its equivalent does not prevent the Commission from authorizing the recovery of future transition costs. *Id.* at 7-8. The Court has already rejected this attempt to avoid the effect of R.C. 4928.38 when it concluded that that section bars the recovery of transition revenue or its equivalent. Further, the distinction advanced by the Commission and DP&L is unsupported by the record: in the case below, DP&L

\$188.88 per megawatt-day and the amount charged competitive retail electric service providers. *Capacity Charge Case*, at ¶¶ 3-15. In the decision reviewed in *Columbus Southern*, the Commission authorized the Retail Stability Rider ("RSR"), set the total amount to be charged over the term of AEP-Ohio ESP at \$508 million to assure that AEP-Ohio maintained a return on equity of 7% to 11%, and directed AEP-Ohio to apply \$1 per megawatt-hour of the RSR revenue to amortize the deferred balance of capacity charges not billed to competitive retail electric service providers. *Columbus Southern*, at ¶ 7.

DP&L has never operated as an FRR Entity or requested authorization to do so. Thus, the Commission's decision to authorize above-market compensation as a "state compensation mechanism" and that part of the Court's decision addressing the amortization of deferred capacity costs are not applicable to the case below.

² The Supplemental Brief is attached as Exhibit A to a Motion filed on May 13, 2016 by the Commission and DP&L seeking leave to file the brief. As discussed in IEU-Ohio's Reply to the Motion, supplemental briefing is not permitted by the Court's Rules of Practice. See S.Ct.R. Prac. 16.08. Additionally, the Supplemental Brief fails to present the Court with any new arguments. Accordingly, the Court should deny the Motion.

sought recovery of the same costs on the same theory of transition cost recovery presented in DP&L's electric transition case.

Third, the Commission and DP&L claim that the Commission may ignore the prohibition in R.C. 4928.38 and authorize DP&L to recover through a retail charge revenue lost to competition and low wholesale energy and capacity prices under authority provided by the "notwithstanding" clause in R.C. 4928.143(B)(2). Supplemental Brief at 3-6. R.C. 4928.143(B)(2)(d), however, contains no provision that permits the recovery of generation revenue lost to competition, and the statutory argument the appellees advance would violate legislative intent and the Commission's own application of R.C. 4928.143 and other provisions at issue in this case.

Fourth, the Commission and DP&L claim that any conflict between the "notwithstanding" clause in R.C. 4928.143(B)(2) and R.C. 4928.38 should be decided in favor of the former because it is the later-enacted statute. Supplemental Brief at 6-9. A fair reading of R.C. 4928.143(B)(2) and other provisions enacted at the same time, however, demonstrates that no conflict requiring resolution exists.

Based on arguments the Court has already rejected and unwarranted statutory claims, the Commission and DP&L seek a result in this case that would unlawfully and unreasonably continue to expose customers to a second round of transition charges and prohibited generation-related subsidies through violations of corporate separation requirements. Because the Commission and DP&L offer no valid reason to affirm authorization of the unlawful SSR, the Court should reverse the Commission's authorization of the charge and direct the Commission immediately to order DP&L to file revised tariffs terminating the charge.

II. ARGUMENT

A. The Commission’s order authorizing the Service Stability Rider is unlawful because it authorizes DP&L to bill and collect transition revenue or its equivalent in violation of R.C. 4928.38 and R.C. 4928.141

In an attempt to rewrite their position that the authorization of the SSR is lawfully authorized now that the Court has rejected the Commission’s decision and reasoning on which both relied, the Commission and DP&L advance the claim that the Court found that the RSR charge was lawfully authorized under R.C. 4928.143(B)(2)(d). Supplemental Brief at 3 (citing *Columbus Southern*, at ¶ 43-59). The claim is misleading at best; at worst, it disregards the Court’s holding that the RSR was a violation of R.C. 4928.38 and R.C. 4928.141.

The unlawful actions of the Commission in the case below are premised on similar actions the Commission took in a case involving AEP-Ohio. In the 2011 AEP-Ohio ESP case, the Commission approved the Retail Stability Rider (“RSR”). That charge was nonbypassable (all customers paid it). As authorized, the RSR permitted AEP-Ohio to recover a target amount of revenue, \$826 million, to produce a return of 7% to 11%. The charge itself was designed to allow AEP-Ohio to bill and collect \$508 million, the amount the Commission calculated that AEP-Ohio would have to collect to replace revenue AEP-Ohio lost as a result of generation competition and low wholesale energy and capacity prices to reach the target revenue. *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 2011 ESP application and the request for the RSR charge, DP&L filed an application for an ESP that contained a request for authorization of the Service Stability Rider (“SSR”) charge. Like AEP-Ohio, DP&L claimed that it needed the SSR 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). Relying on its decision in the 2011 AEP-Ohio ESP case, 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 beginning in 2014. 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 on the merits of these charges, the Court in *Columbus Southern* agreed with customers that the Commission had acted unlawfully and unreasonably when it authorized the RSR for AEP-Ohio 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 held 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).³ 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. *Compare* Opinion and Order at 22 (Appx. at 30) *with Columbus Southern*, at ¶ 8.

If there was any doubt that AEP-Ohio's charge and DP&L's charge are equivalent unlawful transition charges, the Commission and DP&L removed it as they repeatedly cited 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

³ 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 utility 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)).

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 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).

Even the specious reasoning of the Commission is the same in each case. 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).⁴ 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.

⁴ 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.”).

Contrary to their claim that the Court upheld a rider similar to the SSR in *Columbus Southern*, the Court found that the Commission was prohibited from authorizing transition revenue or its equivalent under the guise of R.C. 4928.143(B)(2)(d). The only portion of AEP-Ohio's RSR charge that the Court upheld permitted AEP-Ohio to recover costs related to AEP-Ohio's capacity costs established under federal law.⁵ Based on its decision finding that the RSR permitted AEP-Ohio to bill and collect transition revenue, the Court remanded the case with a directive that the Commission credit the unlawfully collected transition revenue against the deferral being collected through the so-called stability charge. *Columbus Southern*, at ¶¶ 19-25, 40. Accordingly, the claim that the *Columbus Southern* decision supports the position of the Commission and DP&L that the Service Stability Rider is lawful is without merit.

B. The claim that the SSR is unrelated to historic costs and therefore cannot constitute transition costs is meritless

DP&L and the Commission also seek to avoid the prohibition on the authorization of transition revenue or its equivalent contained in R.C. 4928.141 and R.C. 4928.38 by claiming that the SSR is not a transition charge because it is unrelated to historic costs. Supplemental Brief at 7-8. The Court has already rejected the substance of this argument, and the argument is contradicted by the record.

As noted above, the SSR is a charge that the Commission authorized to recover revenue lost due to competition. As DP&L indicated in its case in chief and the Commission accepted in its authorization of the SSR, the SSR charge was designed to recover revenue that DP&L could not secure in the competitive generation market due to retail customer switching and low wholesale energy and capacity prices. Opinion and Order at 17 (Appx. at 25). Within the

⁵ See *supra* note 1 that explains the complicated issue regarding the recovery of deferred capacity costs that was unique to Ohio Power Company; see, also, *Columbus Southern*, at ¶¶ 40, 50-51.

meaning of R.C. 4928.38, it was transition revenue or its equivalent. *Columbus Southern*, at ¶¶ 15-17.

The attempt to distinguish *Columbus Southern* by suggesting that the charge is not related to “historic” costs is simply a variation of the Commission’s rejected rationalization that the SSR is not a transition charge because DP&L did not request a determination of transition revenue under R.C. 4928.39 and 4928.40. What the Commission authorized was a transition charge to collect transition revenue or its equivalent. Just as the Court rejected this argument in *Columbus Southern* at ¶¶ 20-25 because the Commission ignored the nature of the costs sought to be recovered by AEP-Ohio, it should do so in this case as well.

Moreover, the distinction between future and historic transition costs that the Commission and DP&L attempt to make is not supported by the record in this case. As IEU-Ohio explained in its Third Merit Brief, DP&L’s SSR calculation was functionally identical to the transition revenue calculation DP&L advanced in its 1999 transition plan case in which the Commission authorized DP&L to bill and collect \$441 million in transition charges. IEU-Ohio Third Merit Brief at 23 (citing IEU-Ohio Ex. 3 at 26, Attachment K (IEU-Ohio Second Supp. at 40, 80-129), *see, also*, IEU-Ohio First Merit Brief at 15-21; OCC First Merit Brief at 19-21. The authorization of the SSR thus permits DP&L to bill the same kind of transition charges that it was previously authorized to collect and did collect under its electric transition plan.

In DP&L’s electric transition plan case filed in 1999, DP&L went through an exercise to determine its transition costs for the period of 2001 to 2031. IEU-Ohio Ex. 3 at 22, Attachment K at RLL Attachment 1 (IEU-Ohio Second Supp. at 59, 111-129). To establish its transition costs, DP&L presented three separate methodologies. *Id.* The first methodology measured the lost book value of DP&L assets that were subject to competition. The second methodology used

“a lost revenue approach” in which “future annual market revenues are netted against future annual revenue requirements.” *Id.* Attachment K at 11 (IEU-Ohio Second Supp. at 92). The third, and least reliable, attempted to calculate the market price of the generation assets. Rejecting the third method, DP&L’s expert testified that the second methodology he presented was mathematically equivalent to the first methodology that he did rely upon. *Id.* at 25-26, Attachment K at 10-12 (IEU-Ohio Second Supp. at 92-93). Applying the first methodology, the witness estimated that DP&L had \$231 million of generation-plant related transitions costs, and \$210 million related to regulatory asset transition costs, for a total of \$441 million in transition costs over the 2001 to 2031 period. IEU-Ohio Ex. 3 at 22 (IEU-Ohio Second Supp. at 59).

In the case below, DP&L used the second methodology presented in DP&L’s prior testimony to calculate transition revenue.

To set the amount that it needed in additional revenue to meet its target of a target return on equity in the case below, DP&L’s application contained a projection of its annual costs and revenue for each of the years of the proposed ESP term. DP&L Ex. 1 at CLJ-2 (Supp. at 4). One component of the projected costs is based upon DP&L’s costs including depreciation of assets. *Id.* at line 18.

As detailed in Exhibit CLJ-2, the next step in DP&L’s revenue requirement calculation was to calculate operating income. DP&L projected annual operating income by taking its projected annual revenue that included the SSR charge (CLJ-2 Line 7) and subtracting its projected annual fuel and purchase power expense (CLJ-2 Line 12) and its projected annual operating expense (CLJ-2 line 20). DP&L Ex. 1 at CLJ-2 (Supp. at 4). It made several miscellaneous adjustments to the projected annual operating income value (*e.g.*, adjustments for income taxes) to arrive at projected annual net income. *Id.* (lines 24-31). DP&L then divided its

projected annual net income value by an annual projected common equity balance to calculate the annual returns on equity with its proposed SSR charge. *Id.* (line 35). DP&L then performed the same calculation but excluded the effects of its proposed SSR charge. *Id.* (lines 38-46).

In authorizing the total magnitude of the SSR charge, the Commission adopted the values presented in DP&L's calculation, except that the Commission adjusted the projected expense on line 17 (Operation and Maintenance) based on evidence presented by intervenors opposing the SSR charge. Opinion and Order at 25 (Appx. at 33). With this adjustment to projected operations and maintenance expense, the Commission reduced DP&L's proposed charge from \$137.5 million annually to \$110 million annually. The annual charge of \$110 million, thus, represented the additional revenue that DP&L required to make up for revenue it would not recover under market conditions.

Due to the equivalence of the methodologies, DP&L's estimate of the revenue lost over the proposed five years of its ESP is merely a new estimate of the transition revenue which DP&L already has received under its electric transition plan. Despite the record showing that DP&L has already claimed and received all the transition revenue to which it may legally bill and collect, the Commission and DP&L now claim that DP&L may collect additional revenue because the revenue are unrelated to "historic" costs. The distinctions between future and historic "costs" that the Commission and DP&L rely upon, however, are unsupported by the record and should be rejected.

- C. **The statutory interpretation of the effect of the "notwithstanding" clause in R.C. 4928.143(B)(2) presented in the Merit and Supplemental Briefs of the Commission and DP&L is not properly before the Court, is premised on an incorrect statutory construction of R.C. 4928.143(B)(2)(d), and is not supported by legislative intent and the Commission's interpretation of the section and other sections of Chapter 4928**
 1. **The argument that the Commission may ignore the prohibition of the authorization of transition revenue or its equivalent when authorizing**

a charge under R.C. 4928.143(B)(2) should be rejected because it was not relied upon by the Commission in its orders

Having exhausted arguments that DP&L is not billing and collecting transition revenue or its equivalent based on the Commission's authorization of the SSR, the Commission and DP&L argue that the Commission can authorize the collection of transition revenue or its equivalent under R.C. 4928.14(B)(2)(d) based on claims that the prohibitions contained in R.C. 4928.141 and R.C. 4928.38 do not prevent the authorization of the charge. Supplemental Brief at 3-9. The claims on which this argument is based, however, are not properly before the Court.

As noted above, these claims were not a basis for the Commission's decision authorizing the SSR in the case below. In the Opinion and Order, the Commission authorized the SSR based on the same arguments that it used to authorize the RSR for AEP-Ohio and relied on the AEP-Ohio ESP decision for the authorization. Opinion and Order at 25-26 (Appx. at 33-34); Entry Nunc Pro Tunc at 2 (Appx. at 64). The Commission did not address the effect of the "notwithstanding" clause in R.C. 4928.143(B)(2) in either the Opinion and Order or any of the entries on rehearing.

The Commission and DP&L first presented their claim that the prohibition against collecting transition revenue or its equivalent does not apply to charges authorized under R.C. 4928.143(B)(2) due to the "notwithstanding" clause in their Second Merit Briefs in this appeal. The claim that the Commission may resolve an alleged conflict between R.C. 4928.143 and R.C. 4928.38 in favor of the former because it is the later-enacted statute first appeared in DP&L's First Merit Brief. The Commission did not advance a claim that the "later-enacted" statute permits the Commission to authorize transition revenue or its equivalent until it sought leave to file a supplemental brief on May 13, 2016.

As it did in *Columbus Southern*, the Court should decline to consider arguments or claims not relied upon by the Commission in its orders. *Columbus Southern*, at ¶ 38, n.3; *see, also*, *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997) (“Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.”); *State ex rel. Ohio Civil Serv. Emp. Assn., AFSCME, Local 11, AFL–CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004–Ohio–6363, at ¶ 10; *see also*, *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992) (“Appellant cannot change the theory of his case and present these new arguments for the first time on appeal.”); *State ex rel. PIA Psychiatric Hosps., Inc. v. Ohio Certificate of Need Review Bd.*, 60 Ohio St.3d 11, 17, fn. 4 (1991) (“Generally, an issue need not be considered on appeal if the issue was apparent at the time of trial and was not raised before the trial court.”). Failure to enforce this requirement unduly prejudices other parties, such as IEU-Ohio, that are forced by the Commission and DP&L to chase and respond to a moving target. Because the arguments are not properly before the Court, they should be rejected.

2. The claim that there is a conflict between R.C. 4928.143(B)(2)(d) and 4928.38 should be rejected because R.C. 4928.143(B)(2)(d) does not authorize the billing and collection of transition charges

In asserting that the Commission can authorize the SSR to bill and collect transition revenue or its equivalent, the Commission and DP&L assume that the Commission can authorize under R.C. 4928.143(B)(2)(d) the collection of transition revenue or its equivalent. As the Court has already held, that claim is incorrect. *Columbus Southern*, at ¶¶ 14-40.

Moreover, R.C. 4928.143(B)(2)(d) does not provide the Commission with the authority to approve a rider that allows DP&L to bill and collect transition revenue or its equivalent. That division provides that an ESP may contain “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.” As demonstrated in IEU-Ohio’s merit briefs, this language does not authorize the billing and collection of lost generation revenue or transition revenue designed to maintain the financial integrity of an electric utility’s retail generation business. IEU-Ohio First Merit Brief at 15-21; IEU-Ohio Third Merit Brief at 22-29. Accordingly, the premise of the Commission in the decision below that it may authorize the recovery of lost revenue so that DP&L can sustain a return on equity of 7% to 11% through R.C. 4928.143(B)(2)(d) is wrong.

3. **The claim that the Commission may authorize the recovery of transition revenue or its equivalent under R.C. 4928.143 notwithstanding the prohibition in R.C. 4928.38 and 4928.141 should be rejected because it is not supported by legislative intent or the Commission’s prior, simultaneous, and subsequent interpretation and application of the regulatory structure applicable to electric distribution utilities.**

The “paramount concern in construing a statute is legislative intent.” *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 22. “Notwithstanding” clauses such as that contained in R.C. 4928.143(B)(2) therefore must be read in light of the “paramount concern” of the legislation. *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (*quoting State v. Cook*, 83 Ohio St.3d 404, (1998)) (“A cardinal rule of statutory interpretation is that ‘[a] court must look to the language and purpose of the statute in order to determine legislative intent.’”); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (2010); *Yates v. U.S.*, 574 U.S. ___, 2015 WL 773330 at *6 (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (term “tangible object” in Sarbanes-Oxley Act did not include fish because “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in

which that language is used, and the broader context of the statute as a whole.”). In this instance, the “notwithstanding” clause in R.C. 4928.143(B)(2) must be read in light of the enactment in the same legislation of R.C. 4928.141, which prohibits an allowance for transition costs, and other provisions that render the SSR charge unlawful.

As part of SB 221, the legislation enacting R.C. 4928.143 and its “notwithstanding” clause, the General Assembly also enacted R.C. 4928.141. That Section specifies that an electric utility must maintain a standard service offer and that this offer may take the form of a Market Rate Offer under R.C. 4928.142 or an ESP under R.C. 4928.143. R.C. 4928.141 also addresses the previously enacted prohibition on transition revenue and directs the Commission to exclude an allowance for transition costs from any standard service offer. As the Court recently explained, R.C. 4928.141 “expressly prohibits the recovery of transition costs” under “a standard service offer made through an ESP.” *Columbus Southern*, at ¶ 17.

In SB 221, the General Assembly provided additional direction that it did not intend the “notwithstanding” clause to subsume all of the other statutory provisions in Title 49. In particular, the General Assembly modified the State policy by amending and renumbering R.C. 4928.02(H) to provide that it is the policy of the State of Ohio to:

Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.* (Emphasis on the additional statutory language).⁶

⁶ Prior to SB 221, the statutory section was numbered as division (G) and provided that it is the State's policy to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.” *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 315, 2007-Ohio-4164, ¶ 48; *see also* Ohio General Assembly Archives, SB 221, available at: http://archives.legislature.state.oh.us/bills.cfm?ID=127_SB_221.

The amendment specifically prohibits a charge such as the SSR that provides DP&L's generation business with additional revenue through a distribution-like, *i.e.*, nonbypassable, charge.

In addition to prohibiting an allowance for transition costs in R.C. 4928.141, the General Assembly also modified R.C. 4928.17. Under then-existing and current law, this Section requires an electric utility to separate its competitive generation function from the noncompetitive distribution and transmission functions and prohibits the utility from providing any undue preference or advantage to its competitive generation business unit or the generation business of any affiliate. In SB 221, the General Assembly added a requirement that electric utilities obtain Commission approval prior to divesting any generation assets. It is clear that the General Assembly did not intend to repeal the effect of this statute prohibiting a utility from providing an undue advantage or preference to its own competitive generation business by including the "notwithstanding" language simultaneously in SB 221.

When enacting SB 221, the General Assembly also did not repeal R.C. 4928.06 which obligates the Commission to effectuate the State policy contained in R.C. 4928.02. In 2012, the General Assembly subsequently made additional changes to the state policies specified in R.C. 4928.02. *See* Senate Bill 315 (these additional changes did not alter the prohibition in R.C. 4928.02(H)). Therefore, it is clear that the General Assembly intends that the state policies continue to have effect.

While the General Assembly has amended Chapter 4928 several times since it enacted R.C. 4928.38 prohibiting the authorization of transition revenue, it has not repealed or given any signal that the one-time opportunity to collect transition revenue or its equivalent was silently repealed or should be ignored. When it has addressed the issue at all, the General Assembly has enacted amendments that bar transition revenue, retain the bar on undue subsidies, and prohibit

nonbypassable generation related charges. As the Ohio law currently stands, an electric utility was afforded one opportunity to bill and collect transition revenue, and that opportunity is long over. R.C. 4928.38 to R.C. 4928.40; *Columbus Southern*, at ¶ 15-17.

Furthermore, the Commission's decisions bear out the Commission's understanding that R.C. 4928.143(B)(2) did not silently repeal various other requirements of Chapter 4928, and these decisions should guide the Court's decision. *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181 (1972).

In the case below, for example, the Commission rejected another nonbypassable charge proposed by DP&L under R.C. 4928.143(B)(2)(d), the Switching Tracker, because it "violates the policies of the state of Ohio [R.C. 4928.02], is anticompetitive, and would discourage further development of Ohio's retail electric services market." Opinion and Order at 30 (Appx. at 38).⁷

The statutory interpretation advanced in the Supplemental Brief is also inconsistent with prior Commission orders. In 2010, for example, AEP-Ohio requested that the Commission authorize a charge under R.C. 4928.143(B)(2)(c) and (d) to allow it to collect costs associated with closing a generation plant. *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*, Case No. 10-1454-EL-RDR, Finding and Order at 7, 17-18 (Jan. 11, 2012) ("Sporn Order").⁸ The Commission rejected AEP-Ohio's application, finding that it did

⁷ The Commission has also argued, albeit implicitly, to this Court that R.C. 4928.17 also applies to charges authorized under R.C. 4928.143(B)(2)(d). In its Second Merit Brief, the Commission argued that on the facts there was no violation of the prohibitions in Rule 4901:1-37-04(C)(2), O.A.C., and R.C. 4928.17. Second Merit Brief of Commission at 14. The Commission implied, however, that if the facts were different, a violation of the rule would have occurred. *Id.* By implication, therefore, the Commission agrees that R.C. 4928.17 and the Commission's rules promulgated under this statute apply to charges authorized under R.C. 4928.143(B)(2).

⁸ Available at:
<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12A11B35831F43601>.

not have the authority under R.C. 4928.143(B)(2) to allow for such recovery *and* that the recovery of such costs was prohibited by R.C. 4928.02(H). *Id.*

Subsequent to issuing the orders on appeal in this case, and subsequent to filing its Second Merit Brief in this appeal, the Commission issued a decision that again confirms the State policy in R.C. 4928.02 applies to charges authorized under R.C. 4928.143(B)(2). *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, *et al.*, Opinion and Order at 7, 26, 65, 69, 91, 95 (Feb. 25, 2015).⁹ In this order, the Commission held that it was required to modify a rider proposed by AEP-Ohio under R.C. 4928.143(B)(2) because the proposed rider would violate the prohibition in R.C. 4928.02(H):

We note that, as proposed by AEP Ohio, the [bad debt rider] would flow the bad debt of both shopping and non-shopping customers, whether generation- or distribution-related, through a single rider, which may cause the type of subsidy that the Commission must avoid under R.C. 4928.02(H).

Id. at 81. The Commission further held in this order that an additional statutory requirement contained in R.C. 4928.10(D)(3) could not be ignored when authorizing a charge under R.C. 4928.143(B)(2). *Id.* at 82.

In summary, SB 221 and the overall structure of Title 49 make clear that the General Assembly did not intend to give the Commission *carte blanche* to ignore every other statute in Title 49 when authorizing charges under an ESP. The General Assembly's simultaneous and subsequent amendments of Chapter 4928 reflect an intent to maintain the applicability of the prohibitions in R.C. 4928.02(H), 4928.141, 4928.17, and 4928.38. Further, the Commission's own interpretation of R.C. 4928.143(B)(2)(d) in the case below evidences that the Commission

⁹ Available at:
<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A15B25B40110J73365>.

itself does not interpret the notwithstanding clause in such a way that the Commission may ignore the prohibitions contained in other provisions of Chapter 4928. Additionally, the Commission has in cases both prior to and after the case below held that the charges that may be authorized under an ESP are subject to the other requirements specified in R.C. Chapter 4928. Thus, the argument advanced for the first time on appeal by the Commission's lawyers (as well as by DP&L's lawyers) finds no support in the law or the Commission's application of the law.

4. The claim that the Commission may authorize transition revenue or its equivalent by resolving an alleged conflict under R.C. 1.52 should be rejected because there is no conflict between R.C. 4928.143(B)(2)(d) and R.C. 4928.38

In an alternative claim, the Commission and DP&L assert that the Court should find that the notwithstanding clause allows the Commission to ignore the prohibition in R.C. 4928.38 because R.C. 4928.143 was enacted after R.C. 4928.38. Supplemental Brief at 7-9. This claim is premised on Section R.C. 1.52 and is applicable only if two statutes are irreconcilable. As discussed above, R.C. 4928.143(B)(2)(d) is only irreconcilable with R.C. 4928.141 and 4928.38 if the Court reads words into former statute such that R.C. 4928.143(B)(2)(d) would allow the Commission to authorize transition revenue or its equivalent.

The Court has rejected statutory interpretations that require it to add or subtract words from the statutory language. "It is a general rule that courts, in the interpretation of a statute, may not take, strike or read anything out of a statute, or delete, subtract or omit anything therefrom." *Wachendorf v. Shaver*, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948); *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E. 2d 8 (1969) (In matters of construction, "it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used."). The statutes as drafted are reconcilable because R.C. 4928.143(B)(2)(d) does not authorize the recovery of transition revenue or its

equivalent, and therefore, the statutory construction rule favoring later enacted statutes is inapplicable.

Even if the Court found a conflict, the rule would not apply due to the enactment of R.C. 4928.02(H) and 4928.141 in the same legislation. When the General Assembly enacted R.C. 4928.143(B)(2) in SB 221, it also enacted R.C. 4928.141 prohibiting an allowance of transition costs and amended R.C. 4928.02(H) to prohibit nonbypassable collection of generation costs. Based on the General Assembly's enactment of provisions prohibiting recovery of transition costs and undue subsidies of generation services in SB 221, the claim that R.C. 1.52 requires the Court to find that R.C. 4928.143(B)(2) permits DP&L to bill and collect transition charges is without support.

III. CONCLUSION

The arguments and claims presented by the Commission and DP&L in the Supplemental Brief are without merit. As the Court held in *Columbus Southern*, the Commission is without authority to authorize the billing and collection of transition revenue or its equivalent under R.C. 4928.143(B)(2)(d). In the case below, the Commission violated that prohibition and several others when it authorized the SSR. Accordingly, the Court should reverse and remand the Commission's decision authorizing the SSR.

Respectfully submitted,

/s/ Frank P. Darr

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

**Counsel for Appellant/Cross-Appellee
Industrial Energy Users-Ohio**