FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan.	)))	Case No. 08-1094-EL-SSO
In the Matter of the Application of the Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 08-1095-EL-ATA
In the Matter of the Application of the Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	))))	Case No. 08-1096-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Amended Corporate Separation Plan.	))))	Case No. 08-1097-EL-UNC

MOTION TO STRIKE DP&L TESTIMONY AND APPLICATION RELATED TO INCREMENTAL COSTS AS INCONSISTENT WITH THE STIPULATION AND ORDER IN CASE NO. 05-276 EL-AIR BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

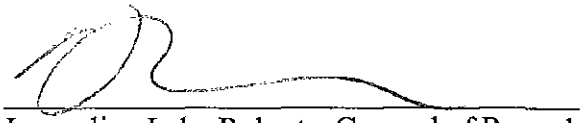
The Office of the Ohio Consumers' Counsel ("OCC") moves to strike those portions of the Application and Testimony of Dayton Power & Light Company ("DP&L") that request incremental cost recovery during the period of the rate plan ending December 31, 2010, and which are not mandated by SB 221.[1]

The reasons the Public Utilities Commission of Ohio ("Commission" or "PUCO") should grant OCC's Motion to Strike testimony and the Application are further set forth in the attached Memorandum in Support.

[1] Upon granting of this Motion, OCC will propose the specific sections to be stricken to the Commission and DP&L to ensure such sections are appropriate.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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MEMORANDUM IN SUPPORT OF MOTION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On October 10, 2008, the Dayton Power and Light Company ("DP&L" or "Company") submitted its Application pursuant to R.C. 4928.141 and 4928.143 for approval of an Electric Security Plan ("ESP" or "Application"). Pursuant to R.C. 4928.143(D), the ESP proposes to maintain the existing Rate Stabilization Plan ("RSP") through December 2010.

The Application also includes DP&L's plan to meet and recover costs for obligations identified in SB 221 relating to alternative energy portfolio targets, energy efficiency targets, peak demand reduction targets, and economic development initiatives.

This Application follows a Stipulation ("Stipulation") entered into by DP&L (and other parties) in Case No. 05-276-EL-AIR. (A copy of that stipulation is attached as Exhibit A.) For the reasons more fully discussed herein, The Office of the Ohio Consumers' Counsel ("OCC"), which represents all of DP&L's residential customers, moves to strike those portions of DP&L's Application and supporting testimony that are not mandated by SB 221 and are inconsistent with the obligations the Company stipulated to and the Public Utilities Commission of Ohio ("PUCO" or "Commission") approved in its Order dated December 28, 2005.

II. ARGUMENT

A. The Stipulation Terms in Case No. 05-276-EL-AIR Can Only be Changed if Subsequent Legislation Mandates DP&L to Incur Incremental Costs before December 31, 2010.

DP&L is proposing several changes in the Application to the SSO terms approved by the Commission in Case No. 05-276-EL-AIR. The Application also contains many provisions required to comply with the new mandates of SB 221 relating to energy efficiency, alternative energy, peak demand reductions and economic development. The language of the Stipulation contemplates DP&L complying with new statutory mandates, but the Stipulation *does not* permit the modifications DP&L requests for the SSO.

A review of the terms of the Stipulation show that DP&L's rate stabilization period ("RSP") terminates December 31, 2010 and that during the RSP DP&L may not

change its standard service offer. Specifically, the Stipulation provides for the following:[2]

1. A rate stabilization period ("RSP") through December 31, 2010;
2. A market-based Standard Service Offer ("SSO") for the RSP with specified discounts;
3. A rate stabilization charge ("RSS") for the RSP;
4. An Environmental Investment Rider ("EIR") for the RSP; and
5. A voluntary enrollment procedure during the RSP.

DP&L has taken the position that SB 221 allows it to request changes to the SSO, regardless of the terms of the Stipulation.[3] The Stipulation does address subsequent legislative changes, but only when the legislative changes require compliance by the Company. The Stipulation states:

> ...**Subsequent Legislation:** The parties recognize that subsequent legislation in Ohio may be enacted that affects the rates, terms, and conditions of this Stipulation. In such event, the Company and Signatory Parties, through good faith negotiations, *will comply with the subsequently-enacted legislation* by amending this Stipulation *to the extent necessary*, while endeavoring to preserve the respective benefits of the compromises reached herein, subject to Commission approval.[4] (emphasis added)

The terms of the stipulation do not permit DP&L to change its SSO rates.

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[2] *In the Matter of the Application of the Dayton Power and Light Company for the Creation of A Rate Stabilization Surcharge Rider and Distribution Rate Increase* ("DP&L Application for Surcharge Rider and Rate Increase"), Case No. 05-276-EL-AIR, Stipulation and Recommendation at 6 (November 3, 2005), approved, Opinion and Order (December 28, 2005).

[3] Deposition of Donna Seger-Lawson.

[4] Id at 6, 7.

B. The Stipulation Cannot be Modified by the PUCO to Permit DP&L to Recover Changes in Cost Aside from the New Statutory Mandates.

It is well settled that the PUCO has inherent power to modify its own orders in response to changed conditions.[5] But, in addressing this very issue, the Ohio Supreme Court stated:

> Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.[6] (emphasis added)

This statement by the Ohio Supreme Court is especially pertinent to cases that have been resolved by multi-party settlement and stipulation—as was done in Case No. 05-276-El AIR.

Assuming, arguendo, that the PUCO's decision needs to be changed and that it is in error (thereby satisfying the criteria enumerated by the Court), DP&L agreed in the Stipulation to forego the recovery of incremental costs unless the legislative changes required compliance.[7]' DP&L cannot support its position requesting that it be permitted to circumvent the very terms it agreed to in the Stipulation. While the need to address new statutory mandates is clearly contemplated in the Stipulation,[8] many other elements included in the Application are not mandatory or do not require compliance. For example, DP&L proposes a fuel adjustment clause to recover incremental increases in

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[5] *Ohio Consumers' Counsel v. Pub. Util. Comm'n. of Ohio* (1984), 10 Ohio St. 3d 49 (per curiam).

[6] Id. at 51.

[7] DP&L Application for Surcharge Rider and Rate Increase, Stipulation at 6, 7.

[8] Id.

fuel rates through the end of the RSP, December 31, 2010. The statutory language in SB 221 states:

> (D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility *may* include in its electric security plan under this section, and the commission *may* approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.[9] (emphasis added)

First, the statutory language is permissive, not mandatory. It states a utility may include incremental cost recovery proposals...and the Commission may approve the same. Contrast this with the language in the Stipulation that states when the Company must comply with subsequently enacted legislation...the Stipulation will be amended to the extent necessary. The Stipulation only addresses statutory mandates not permissive cost recovery mechanisms.

Finally, the Company has neither claimed nor demonstrated a need to modify the Stipulation in Case No. 05-276. The consideration of whether there is a need for a company to recover additional costs has traditionally been framed by the U.S. Supreme

[9] R.C. 4928.143(D).

Court decisions in the *Hope* and *Bluefield* cases.[10] Unless the rates authorized by the Commission are confiscatory, they will be upheld. In *Bluefield* the Court stated:

> ...A public utility is entitled to such rates as will permit it to earn a return on the value of property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.[11]

In *Hope,* Justice Douglass further explained:

> ...the return to the equity owner should be commensurate with returns on other investments having corresponding risks. That return, moreover should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital. [12]

According to OCC Witness Woolridge, DPL Inc.'s return on equity has been around 20% over the last five years. This vastly exceeds the proposed equity cost in DP&L's application of less than 12%. Given these returns, there is no basis to claim that there is a financial "need" of DP&L that would provide a basis for modifying the Commission's Order approving the Stipulation.

C. The Doctrine of Invited Error Prevents DP&L from Objecting to the Language in the Stipulation to which it Agreed.

DP&L has waived its right to object to the language in the Stipulation regarding what subsequent legislation can be grounds for modifying the Stipulation and the Commission's Order approving the same. Under the doctrine of invited error the

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[10] *Federal Power Comm. V. Hope Natural Gas Co.*, 320 U.S. 591(1944); *Bluefield Water Works & Imp. Co. v. Pub. Service Comm. Of West Virginia,* 262 U.S. 679 (1923).
[11] *Bluefield* at 692, 693.

[12] *Hope* at 603.

Company cannot now object to the language in the Stipulation that concerns when the Stipulation can be modified. *Center Ridge Ganley Inc. v. Stinn,* 31 Ohio St.3rd 310 (1987).

III. CONCLUSION

For all the reasons discussed above, the Application and testimony of DP&L that does not specifically address programs and costs that are mandated by SB 221 (which are energy efficiency, demand response, alternative energy portfolios, and economic development) should be stricken from this case. OCC respectfully requests its Motion be granted.

Respectfully submitted,

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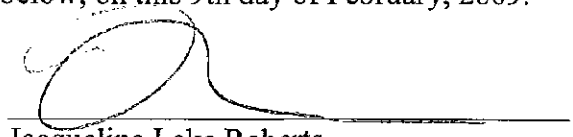
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served via electronic transmission to the persons listed below, on this 9th day of February, 2009.



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