**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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** |
| In the Matter of the Application of **The Dayton Power and Light Company** for Approval of Revised Tariffs. | : | Case No. **12-427-EL-ATA** |
| In the Matter of the Application of **The Dayton Power and Light Company** for Approval of Certain Accounting Authority. | : | Case No. **12-428-EL-AAM** |
| In the Matter of the Application of **The Dayton Power and Light Company** for the Waiver of Certain Commission Rules. | : | Case No. **12-429-EL-WVR** |
| In the Matter of the Application of **The Dayton Power and Light Company** to Establish Tariff Riders. | : | Case No. **12-672-EL-RDR** |

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# REPLY BRIEF

SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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# TABLE OF CONTENTS

**Page**

**BEFORE**
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| | | |
|---|---|---|
| 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** |
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## INTRODUCTION

As there is a huge volume of briefing material in this case, the Staff will submit only comments on those areas which are viewed as particularly troubling. Effort will be made to avoid a simple recapitulation of argument. Silence in this document as to any specific argument should not be taken as agreement with any other party rather it should be viewed that the Staff's position has already been sufficiently stated in the initial brief. Each topic that warrants comment in Staff's view will be presented below.

## DISCUSSION

### A. An ST is not permissible; an SSR is permissible.

The Commission has been presented with arguments from the intervenors that both the ST and the SSR are illegal while the Company argues they are both legal. Each side is half right. The ST is not permitted, while the SSR is.[1]

The statute provides that the ESP:

> …may provide for or include, without limitation, any of the following:
>
> * * *
>
> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.[2]

This is, quite obviously, a very broad grant of authority. Several observations are necessary.

First, the threshold for Commission action is a determination that a particular condition will stabilize or provide certainty regarding retail electric service. As is relevant in this case, the question is initially would an ST or an SSR provide certainty

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[1] As discussed in the initial brief, it is a question for the Commission to decide whether an SSR is appropriate in this case. To allow the company the SSR, the Commission would need to make certain threshold findings. Whether those findings are appropriate in this case is not a matter on which the Staff has a position.

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

regarding retail electric service. Despite interveners' arguments to the contrary, it is obvious that the presence of both the ST and the SSR would provide stability and certainty.

There is no retail electric generation service, whether that service is provided by DP&L itself or by a CRES provider, without DP&L in its service territory.[3] A healthy DP&L is necessary so that retail electric generation service can be provided at all. The presence of the ST and SSR would assure a healthy DP&L by providing a sure source of revenue (the SSR) and by insulating the company from the erosion that would occur through an increase in shopping (the ST). Indeed anything that would improve the utility's financial situation would pass this very trivial aspect of the statute in isolation.[4]

Second, it should be noted that the statute does not require that the condition ordered by the Commission be "necessary' to stabilize or provide certainty regarding retail electric service. Rather that action must merely, in the Commission's view, "have the effect of" stabilizing or providing certainty regarding retail electric service. Under R.C. 4928.143(B)(2)(d) the measure does not have to be the best, the only, the most cost effective or even a requisite step that could be taken to stabilize or provide certainty regarding retail electric service. It must merely have the effect.

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[3] Despite electric restructuring, the distribution service territories remain. R.C. 4933.81 *et seq*.

[4] It should be observed that many other measures would be permissible as well, not merely measures that benefit the utility. The statute is simply not limiting.

Examined in isolation, R.C. 4928.143(B)(2(d) provides no bar to either company proposal, but the section cannot be viewed in isolation. The General Assembly has provided a policy statement in R.C. 4928.02 which the Commission is obligated to implement in any action taken under Chapter 4928.[5] The primary portion of this policy, as is relevant here is that the Commission is 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.[6]

This is the section that bars the ST. The ST would essentially pay the utility its lost profit for sales not made due to increased switching levels. DP&L would be financially insulated from the effect of shopping increases. When a customer would choose to shop, DP&L would both be paid the lost profit because of the shopping and would be able to sell the unregulated generation freed up by that shopping in the unregulated market. This is a direct subsidy of an unregulated activity by charging regulated rates to customers. The statute bars it.

The SSR is entirely different. It is not keyed to the shopping level. Rather it is tied to ensuring the financial condition of DP&L. This goal is permitted by statute. Indeed, far from violating the provisions of R.C. 4928.02, it is the base upon which *all*

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[5] *See*, R.C. 4928.06(A), and *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176.

[6] R.C. 4928.02(H).

the requirements are built. A sound DP&L is the necessary base upon which reliable retail electric service can be provided at all, by anyone. An SSR is available not because of some favorable feeling toward the utility, rather it reflects the real world need on the part of *customers* for a sound utility.

In conclusion, an ST is not permissible. It constitutes an illegal subsidy. An SSR is available, in principle. It is authorized under R.C. 4928.143(B)(2)(d) and not contravened by R.C. 4928.02. Whether the Commission chooses to authorize an SSR in this case is a matter of discretion about which the Staff has no opinion.

### B. Corporate Separation

A variety of interveners recommend immediate separation of generating assets from DP&L. While Staff would like to endorse this, there appears to be no means to effectuate an immediate separation. As the adage puts it "wishing does not make it so". The fact of the situation is that all assets of the company are tied up under the bonding requirements as they exist. That the bonds might have, or perhaps should have, been done differently is of no consequence. We must live with the situation as it is, not as it might have been. Separation must wait for the bonds to be callable much as we might wish it were otherwise.

### C. Confiscation

The Company has suggested that, if it does not receive approval for the ST and SSR, there may be an unconstitutional taking of its property. This concern is readily dismissed. The constitutional test requires that a company be given an opportunity to

earn a reasonable return on its *regulated* investment. The test is done on an aggregate basis; this is to say that confiscation can only occur if the overall return authorized for *all* regulated investment is unreasonably low. There is no requirement that any one service be provided at a profit, reasonable or otherwise. To claim that any one service is required to be offered at an unconstitutionally confiscatory price is legally meaningless.

The company's concern is particularly off base as regards the proposed ST.

The ST is an effort by the company to earn a return on plant that quite explicitly is *not used to provide a regulated service*. It must be remembered that the proposed ST would come into play when shopping increases above a set point. Under that scenario, the company would receive the profit margin that it would have received if that customer had not switched. Of course, at that time, the customer has switched and the company's generating plant is no longer supplying that customer. Generating plant that is no longer supplying the standard service offer is simply competitive. The ST would allow the company to recover its profit as though the customer were still receiving Standard Offer service. Thus the ST would provide a return on unregulated plant that was no longer used in the provision of regulated service.[7] The constitutional test does not speak to this matter at all and it is, therefore irrelevant.

As to the SSR, the constitutional test is still irrelevant but for slightly different reasons. Because the SSR goes to the financial health of the overall company, both

[7] As noted previously, the ST would constitute an illegal subsidy from regulated to unregulated activities.

regulated and unregulated,[8] the outcome of a decision regarding the SSR is relevant in the constitutional analysis required to determine if there has been a taking.[9] That analysis cannot be undertaken in this case however. The appropriate vehicle to assess the overall reasonableness of the return authorized for the company is in a base rate proceeding under R.C. 4909.18. Indeed, one of the primary purposes of such a proceeding is to determine this very thing.[10] If the company believes that its property is being confiscated in violation of the constitution because the proposed SSR is either denied or set at a level too low, its recourse is to file a base rate proceeding where the question can, indeed must, be assessed directly.

Thus, constitutional concerns cannot arise in the context of this case. The company's arguments to the contrary should be rejected.

Future Switching Rates

The company claims that Staff witness Choueiki's forecasts of future switching rates are incorrect. This is, of course, either, looked at *a priori*, an impossibility or, considered *a posteriori*, a truism. A forecast is, inherently, just an estimate. It can be more or less reasonable, but it can never be incorrect before the fact. Once time has passed, and the predicted event has occurred or not, essentially all forecasts will be

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8 Given the inability to spin off the unregulated (generation) aspect of the business immediately, this combination is factually unavoidable.

9 This observation is equally true for any service the company must offer. All regulated services together are relevant for constitutional purposes.

10 *See*, R.C. 4909.15(A)(2) and (3).

proven to be wrong to one degree or another. Thus the observation that any forecast will be wrong to some degree is simply a truism.

As is relevant here, Dr. Choueiki's forecast appears reasonable, being supported by over a decade's worth of observations about the progress of switching in Ohio. It can be relied upon as a reasonable basis upon which to make decisions.

The inherent uncertainty of forecasts underscores a larger point however. While it is reasonable and indeed necessary for the Commission to rely on forecasts in making its complicated decisions, it is best to avoid using forecasts more than is necessary. This is the fundamental reason that the Staff recommends a shorter term for an SSO in this case. To approve a five year term, it is necessary to guess about switching rates, capacity charges, and capital investments (among many other things) years in advance. It is the nature of forecasts that they begin subject to error and the likely error increases as the period forecasted increases in length. Five years is a very long time and approving a plan of such length necessitates an inappropriate reliance on estimates.

The better course of action, as the Staff recommends is a shorter, three year term for the plan. This allows for some certainty now, as the estimates are better, while providing a fresh look, at a time when much better data will be available, at the company's situation in several years.

The Company argues that the Staff is incorrect in this. It claims that the Staff did not consider the company's need for certainty but the Staff did weigh this concern. Indeed this is why the Staff recommended a three year, as opposed to a one year term. In Staff's view, the three year term strikes the appropriate balance between the company's

need for certainty and the customers' need for reasonable rates. The Commission must weigh the interests of all constituents, company and customer alike. Three years does this and Staff recommends it be approved.

### D. Staff Witness Benedict was correct.

Staff witness Benedict sponsored an adjustment to Dayton Power and Light's generation dispatch forecast based upon his own independent analysis and forecasting methodology. The company claims that witness Benedict made two errors in his analysis. The Company is incorrect.

First, the Company objects to the forced outage rates utilized in Mr. Benedict's analysis, on the grounds that they were not explicitly based on historical averages. However, the forced outage rates utilized in Staff's analysis are reasonable. In fact, Mr. Benedict did not make any independent adjustments to the forced outage rates assumed in his model, nor would it have been appropriate for him to do so. If he had made such an adjustment for Dayton's generating units, it would have then become necessary to make a similar adjustment for each of the hundreds of generating units across the model footprint in order to avoid introducing bias to his analysis. Instead, Mr. Benedict relied upon the independent expertise of the Eastern Interconnection Reliability Assessment Group's Multiregional Modeling Working Group (MMWG) for this information. The Company compounds its error by conflating O&M forecasts with forced outage rates. Forced outages are, by definition unplanned. That is why they are termed "forced". Being unplanned, these outages occur outside of management control.

Secondly, the Company correctly observes that Staff witness Benedict was also troubled by the Company's use of "costless adders". The Commission should be as well. These "costless adders" represent artificial adjustments, with no foundation in any actual or demonstrable cost. Their only effect is to reduce the Company's projected generation dispatch and revenues. The Company argues that the effect of utilizing "costless adders" was insignificant because they only applied to gas units[11]. Their use is nonetheless problematic as they are arbitrary, reflecting no real world cost. Staff can only assume that such arbitrary adjustments were introduced to partially compensate for the Company's inferior forecasting methodology. Indeed, Dayton Power & Light's reliance on capricious "costless adders" in producing its generation dispatch forecast merely serves to demonstrate the superiority of Staff's analysis.

Mr. Benedict made no errors in his analysis and it should be utilized by the Commission.

### E. FRR status is important.

DP&L argues that it should be treated like AEP despite AEP being an FRR company. This is clearly erroneous. AEP will remain an FRR entity until May 31, 2015. This means that AEP's capacity remains committed to serving all of the load[12] in its service area until that time. It is therefore appropriate that ratepayers pay for the value of

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[11] That the costless adders applied only to gas units was acknowledged by Mr. Benedict. Tr. VI at 1537.

[12] This includes both AEP's SSO load and the CRES providers' load.

the capacity that is committed to them. DP&L did not choose this route. DP&L's capacity has always been in the competitive market. DP&L sells all of its capacity into the market and buys back what is needed to serve the standard service offer load. This difference in what the companies have committed is key and requires differential treatment. DP&L is not entitled to cost-based pricing or to additional "above market compensation" for its capacity as it has never received cost-based prices since the inception of RPM. It chose to receive market-based prices and that is all that it is entitled to receive.

## CONCLUSION

In conclusion, the Staff respectfully requests the Commission adopt the recommendations it has made.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following Parties of Record, this 5th day of June, 2013.

*/s/Thomas W. McNamee*

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**Case No(s). 12-0426-EL-SSO, 12-0429-EL-WVR, 12-0427-EL-ATA, 12-0428-EL-AAM, 12-0672-EL-RDR**

Summary: Brief Reply Brief electronically filed by Mrs. Tonnetta Y Scott on behalf of PUCO