**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 Market Rate Offer | : | 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 OF THE KROGER CO.

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## I. Introduction.

As noted by several parties, DP&L's request for an ESP fails to satisfy the legal standard set forth in RC 4928.14. The cost of maintaining DP&L's "financial integrity" is shifted onto shopping and other customers in return for no substantial benefit. The sole justification for these charges is "stability," in the sense that the Company will have more financial integrity and therefore be more "stable" if the SSR is collected on a non-bypassable basis. Certainly, the ability to collect "a general amount of money that contributes significantly to the ongoing financial integrity of the Company"[1] without any

[1] DP&L Post Hearing Brief at 43-44.

requirement to provide customers with any commensurate benefit is helpful to the Company and its bottom line. But it is fundamentally unfair and unreasonable to allow this sort of bald subsidy, particularly from customers who purchase their generation elsewhere, and in some cases have been purchasing generation from other sources for an extended period of time. The continuance or the increase of those charges would constitute unreasonable and unlawful transition cost recovery. Therefore, the Public Utilities Commission of Ohio (the "Commission") should reject DP&L's proposal to make the SSR non-bypassable, especially as those charges relate to long term shopping customers.

The Commission should also establish a sunset date after which individual shopping customers are no longer subject to an SSR, or other type of "stability" related charge. A sunset date of five (5) years, measured from the date of the individual customer's initiation of Competitive Retail Electric Service, is a reasonable, if not generous, time period for the Company to collect non-bypassable transition charges from shopping customers under the circumstances set forth in DP&L's filing.

Additionally, the Commission should reject DP&L's proposal for a "Switching Tracker." The Switching Tracker proposal is an overt attempt at improper transition cost recovery. Moreover, it creates substantial rate uncertainty for all customers going forward and therefore cannot reasonably be considered to foster or promote rate stability or rate certainty. In fact, the Switching Tracker is blatantly anti-competitive and forces shopping customers to pay for the same services twice.

Finally, the Commission should reject DP&L's proposal to make its proposed Reconciliation Rider ("RR") non-bypassable. Each of the existing riders that the

Company proposes to reconcile through the RR is currently bypassable. DP&L provides no adequate reason for making these riders non-bypassable. Shopping customers do not cause these costs to be incurred and, appropriately, should not be obligated to pay for them.

## II. Argument.

### A. The Commission Should Reject DP&L's Proposed SSR.

#### i. *The SSR is an unreasonable form of transition cost recovery.*

The proposed SSR in combination with the proposed Switching Tracker would require shopping customers to pay a form of transition cost recovery, i.e. an attempt to recover generation costs that are "stranded" due to shopping. Transition cost recovery for DP&L was fully resolved and completed several years ago. The Stipulation in the transition cost recovery docket provided that recovery of transition costs was to be completed by the end of 2003. Allowing the SSR to be collected from shopping customers on a non-bypassable basis would improperly extend the recovery of transition costs beyond that terminal date, agreed upon by the Company.

The commission should deny the request for the Switching Tracker and the non-bypassable SSR charge in light of the lack of express statutory support for continued transition charges, and the fact that it is fundamentally unfair, unjust and unreasonable to require shopping customers to compensate DP&L for current or stranded generation related costs while those customers purchase their full generation requirements from a CRES provider. In effect, approval of this proposal would double charge shopping customers for generation related costs.

Section 4928.143(B)(2)(d), Revised Code states that an ESP may provide for or include, without limitation:

> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, by-passability, 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.

It should be noted that the term "financial integrity," heavily relied upon by DP&L, does not appear in the text of the statute. However, if the "financial integrity" of DP&L is found to promote stability or "certainty regarding retail electric service," that finding should be balanced against the clear requirement in Ohio Revised Code § 4928.40 that transition charges end no later than December 31, 2010. The Commission should also consider that DP&L was given substantial notice that transition charges would cease.

Furthermore, the fact that DP&L would like to characterize these charges as unrelated to any "cost" is unsupportable. Even if that were true, it would not be fair or equitable to require customers to pay a charge without receiving any benefit. If these requested charges are unrelated to costs, there is no adequate rationale for imposing these charges on customers. In fact, the main cause of DP&L's potential financial underperformance, which drives the need to collect the SSR, is increased customer shopping caused by DP&L's own overly aggressive pricing of its generation, which makes shopping for generation from a competitive retail electric supplier ("CRES") in DP&L's service territory very attractive.

It is not fair or reasonable to expect shopping customers, particularly long term shopping customers, to reward DP&L with $137.5 million per year for the term of the

ESP to cover underperformance associated with DP&L's short term aggressive pricing strategies. Shopping customers, particularly long term shopping customers, should not be required to simply give DP&L a "general amount of money" because DP&L priced its own generation too high and may therefore lose customers.

By casting the SSR as not related to any "cost," DP&L is over-simplifying and ignoring the fact that the stated basis for SSR is "cost" based in that it refers to allowing the Company to earn a fair rate of return on equity. That equity is tied up in investments, and those investments consist largely of generation assets in this case. The Company admits that its distribution and transmission operations are financially solid. The financial problem that DP&L seeks to solve with SSR therefore relates to generation assets. With increased shopping, lower energy prices and lower capacity prices, DP&L's generation assets do not provide the Company with what the Company regards as sufficient revenues to attract capital. In other words, the Company's missteps in transitioning to a market based structure may create problems for the Company in generating revenue sufficient to earn a return on its large investment in generation assets. At its crux, the Company seeks to improperly recover transition costs through the SSR.

ii. *If the Commission approves the SSR, DP&L's recovery should be no greater than the current Rate Stabilization Rider*

If, however, the Commission finds that DP&L's proposed SSR promotes some permissible goal of an SSO, the Commission should balance several factors in determining the appropriate level of those charges. Taking into account all of these factors, if the Commission determines that a "stability" charge is warranted to ensure DP&L's financial integrity, the charge should be no greater than the current Rate

Stabilization Charge ("RSC"), particularly as applied to long-term shoppers, which for purposes of this discussion are customers who have been shopping continuously for at least three (3) years. There is no evidence in this docket that these long term shopping customers impose any greater costs on DP&L today than when the RSC was adopted. Shopping customers currently contribute to DP&L's generation cost while purchasing their full generation requirements from a CRES provider through existing RSC. The proposed SSR would dramatically increase this cost recovery by 88%, by increasing the charge from approximately $73 million per year to $137.5 million under the proposed SSR. Obviously, long-term shopping customers should not be required to bear any greater unit-cost responsibility of DP&L's legacy costs than they bear today. These customers receive absolutely nothing from DP&L in exchange for the substantial RSC they currently pay. Increasing these charges by 88% will undoubtedly enrich the Company, but it is unfair and unreasonable, especially as applied to long term shopping customers.

The Commission should also strongly consider that the SSO rates from which shopping customers have been fleeing were negotiated by DP&L. In negotiating the current SSO rates, DP&L gained the freedom and ability to earn rates of return beyond SEET levels for three years, but also assumed the risk that pricing SSO rates too high would ultimately result in a loss of sales to competitors. DP&L could have profited handsomely from this arrangement if market prices had risen. Instead, capacity and wholesale power pricing in the market have declined. DP&L's SSO pricing has thus become unattractive to customers with an option to shop and shopping levels have increased. DP&L now seeks to insulate itself from the consequences of its gamble by converting its RSC into the SSR - and increasing the level of these charges by 88%. The Commission should not accept this strategy of attempting to privatize gains and socialize losses. It is clearly unfair to require shopping customers to bear the cost of DP&L's risk. Notably, the majority of the shopping load has gone to a DP&L's affiliate and has therefore remained within DP&L's corporate family. If the Commission determines that any level of SSR is warranted, that the charge should be no greater than the current RSC, particularly for longer-term shopping customers.

iii. *DP&L's past and projected return on equity do not support the need for the SSR or Switching Tracker.*

DP&L's projected ROEs without the SSR and the Switching Tracker are reasonable given that DP&L has had thirteen years' notice that retail competition was imminent, that shopping customers have and will continue to make material contributions to DP&L's generation costs some thirteen (13) years since the introduction of retail competition in Ohio, and that the (current) SSO prices negotiated by DP&L (in combination with the RSC) provided the Company with double-digit ROEs in recent years. Those SSO prices ultimately may prove to be uncompetitive in the market, but shopping customers did not make those pricing decisions.

Moreover, as noted in the ESP filing, DP&L is winding down its days as a regulated generation service provider. The Company's need to attract capital on behalf of retail customers going forward should be directed primarily to the provision of distribution service. Projecting ROEs beyond 2014 is speculative and unreliable. Net operating income forecasts are estimates driven by projected changes in revenues and expenses that may or may not come to fruition. Those estimates do not support forever charging long-term shopping customers twice for generation.

iv. *If the PUCO approves a form of the SSR, the Commission should should establish a sunset date for the SSR for established shopping customers.*

The Commission should also establish a sunset date after which individual shopping customers are no longer subject to the SSR. There should be a firm date beyond which shoppers should no longer be forced to pay generation related costs of DP&L. A reasonable sunset date of five years measured from the date of the shopping customer's initiation of Competitive Retail Electric Service should be established as a firm cut-off date, after which no shopping customer should be required to pay any "stability" or "financial integrity" charge.

Sunset dates that are applied at the individual customer level are inherently reasonable. One of the difficulties with the current "one size fits all" approach is that the "stabilization" charge is the same for both long-term shoppers (e.g., customers shopping continuously for at least three years) and recent shoppers, even though the responsibility to pay a "legacy cost" charge should logically diminish when the customer has departed from SSO service for a longer time period and purchased generation from a CRES. Under the individual sunset approach, although all shopping customers would be subject to five (5) years of charges for legacy generation costs, an established cut-off date would provide a bright line date after which the individual shopping customer would no longer be subject to double charges for generation service. Establishment of a date certain for shopping customers is also promotes the goals of "rate certainty" and "rate stability."

B. The PUCO should reject the Switching Tracker as an unreasonable form of transition cost recovery.

As noted in DP&L's post hearing brief, the proposed Switching Tracker would defer for later recovery the difference between the level of shopping as of August 30, 2012 (62%) and the actual level of shopping. The Switching Tracker is an overt attempt at improper transition cost recovery. Moreover, it creates substantial future rate uncertainty and potential confusion for customers going forward and therefore cannot reasonably be considered to be a feature of rate "stability" or rate "certainty." DP&L's Switching Tracker is ineffective in providing rate certainty or stability to customers. If the Commission does not wholly reject the Switching Tracker, the Switching Tracker should, at the very least, be made by-passable to long-term shopping customers. DP&L inarguably has not and will not incur generation costs on behalf of long term shopping customers, and it is therefore fundamentally unfair and unreasonable to charge existing shoppers for lost revenues from other customers who may switch to competitive generation suppliers in the future. The Switching Tracker is also fundamentally anti-competitive, since all shopping customers will be forced to pay for generation costs twice, while SSO customers will be required to pay those same costs only once.

C. The Proposed Reconciliation Rider should be made bypassable.

The proposed Reconciliation Rider ("RR") is intended to be a non-bypassable charge that would include any deferred balance that exceeds 10% of the base recovery rate associated with any of the following "true-up" riders: the FUEL Rider, the RPM Rider, TCRR-B, AER, and the proposed Competitive Bid True-up (CBT) Rider. In addition, the RR would include the costs of administering the Competitive Bidding Process, and the costs of certain competitive retail enhancements.

RR should be by-passable by shopping customers since the existing riders to be reconciled through the RR are currently properly by-passable. The CBT Rider is also proposed to be by-passable. Shopping customers do not cause any costs recovered by these riders and are not currently obligated to pay for them. DP&L claims that if the balance of these riders becomes "excessive", it could result in additional switching. (The so-called "death spiral" scenario.) The Company claims that to prevent additional shopping, current shopping customers should be assigned cost responsibility for these currently by-passable riders if the deferral balance exceeds 10%. This is merely another version of the improper and unreasonable transition cost claim discussed earlier herein.

DP&L argues that shoppers avoid costs incurred on their behalf. However, long term shoppers would be saddled with the reconciliation of otherwise by-passable costs that were inarguably not incurred on long term shoppers behalf if RR were to be made non-bypassable. In fact, DP&L's proposal results in a baseless assignment of cost responsibility upon long term shoppers. To make Rider RR non-bypassable would be to levy an improper tax on long term shopping customers that should be enthusiastically rejected by the Commission.

Finally, to the extent that DP&L incurs legitimate administrative costs to provide bona fide "competitive retail enhancements" that directly benefit shopping customers, these costs can properly be segregated and charged solely to shopping customers on a non-bypassable basis. There is no good ratemaking reason to include these and similar costs in the proposed RR.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply Brief of The Kroger Co.* was served this 5th day of June, 2013, via electronic mail upon the following:

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