BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell Its Generation Assets.	))))	Case No. 13-2420-EL-UNC

COMMENTS ON DP&L'S SUPPLEMENTAL APPLICATION TO CHARGE CUSTOMERS EVEN MORE MONEY FOR ITS PROTRACTED TRANSITION TO MARKET BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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March 25, 2014

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I. INTRODUCTION

On February 25, 2014, Dayton Power & Light Company's ("DP&L" or "Utility") filed a Supplemental Application for Sale or Transfer of Generation Assets ("Supplemental Application"), which will likely increase the rates customers pay (by an unspecified sum over an unknown period of time). Nearly 15 years after the 1999 law that restructured electric service for Ohioans, DP&L's supplemental application provides no further details regarding its plans to sell or transfer its generation assets, contrary to the PUCO's Rules,[1] the law,[2] and the September 4, 2013 Opinion and Order in DP&L's ESP proceeding.[3] This is especially troubling because in its ESP proceeding, DP&L used the non-divestment of the plants as a reason to charge more money to customers. And it is now using the divestment of the plants as a reason to charge even more money to

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[1] Ohio Admin. Code 4901:1-37-09.

[2] See R.C. 4928.17(B) allowing the PUCO to reject and require refiling of a substantially inadequate plan.

[3] *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-0426-EL-SSO et al, Opinion and Order of September 4, 2013 at 25 [hereinafter *DP&L ESP II]*.

customers. The PUCO recently ruled[4] that DP&L should divest its generation assets by no later than January 1, 2016, moving up the separation by a year and six months (from May 31, 2017).

Instead, DP&L's Supplemental Application presents a number of requests for special rate treatment that were not presented in its initial application. These special ratemaking requests include (1) a proposal to continue DP&L's Service Stability Rider ("SSR") even after sale or transfer of its generating assets, (2) a proposal for DP&L to retain the environmental liabilities associated with its generating assets and charge such costs to customers, and for an accounting deferral until such costs are claimed in a rate proceeding (3) a proposal to charge customers all costs incurred by DP&L, such as financing costs, that are associated with the sale or transfer of DP&L's generating assets, (4) a proposal to retain DP&L's 4.9% ownership interest and obligations associated with its purchase power agreement with Ohio Valley Electric Corporation ("OVEC") and for an accounting deferral until such costs are claimed in a future rate matter, and (5) a proposal to permit DP&L to "temporarily maintain total long term debt of $750 million or total debt equal to 75% of rate base – whichever is greater" through 2018, in contravention of the terms of a previous settlement requiring a capital structure including at least 50% equity.[5] And, despite the fact that the proposed special rate treatment could cost customers tens of millions, if not hundreds of millions, of dollars, DP&L nonetheless reasserts its request for waiver of a hearing.

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[4] See *DP&L ESP II*, Second Entry on Rehearing at 29 (relying upon the new information contained in DP&L's supplemental application filed in this proceeding).

[5] DP&L Supplemental Application at 3-8.

DP&L's requests for special rate treatment would impose significant costs on customers. Its requests are without merit and should be rejected outright as explained in detail below. DP&L's requests conflict with the law, specifically R.C. 4928.38, which requires DP&L, after the market development period (that ended eight and a half years ago),[6] "to be fully on its own in the competitive market." DP&L's requests also are inconsistent with sound regulatory policy.

Moreover, because the application contains no further details on the utility's plans, the PUCO should reject the application as substantially inadequate under the law[7]. If the application is to move forward, the PUCO should reject DP&L's request that no hearing be held. A full hearing on DP&L's proposed sale or transfer and rate-related requests should be held – if DP&L files a substantially complete application. Such a hearing should be preceded by ample opportunity for discovery, consistent with the PUCO's rules and Ohio law.[8]

II. COMMENTS

A. Standard Of Review

OCC's initial comments delineated the standard of review established by R.C. 4928.17(E). Under that standard the PUCO must approve any proposed sale or transfer of generating assets. OCC also identified the minimum filing requirements of a sale or transfer application under Ohio Admin. Code 4901:1:37-09(C). As discussed there, the PUCO may require a hearing "if the application appears to be unjust, unreasonable, or not

[6] DP&L's market development period ended on December 31, 2005. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order (September 2, 2003).

[7] R.C. 4928.17(B).

[8] See R.C. 4903.082; Ohio Admin. Code 4901:1-16.

in the public interest."[9] And the PUCO "shall" schedule a hearing if the application "proposes to alter the jurisdiction of the commission over a generation asset."[10] After a hearing, or, if no hearing is required, the PUCO "shall issue an order approving the application" if the sale or transfer is "just, reasonable, and in the public interest."[11]

Additionally, a sale or transfer of generation assets is an integral part of a utility's corporate separation plan under R.C. 4928.17. Consequently, the PUCO must evaluate how the proposed sale or transfer affects the utility's corporate separation plan.

Those same standards apply to DP&L's Supplemental Application. Furthermore, as an integral part of a corporate separation plan, PUCO review of a plan for sale or transfer of generating assets must allow specific objections to the plan, and afford parties a hearing on issues the PUCO determines reasonably require a hearing.[12] Consistent with the procedures set forth in R.C. 4928.17(B), the PUCO should reject a generation asset transfer plan that is "substantially inadequate."

Ohio Admin. Code 4901:1-37-02(E) establishes that the utility has the burden of proof to demonstrate that a proposed sale or transfer of generation assets is "just, reasonable, and in the public interest." The PUCO must consider DP&L's application using these standards.

[9] Ohio Admin. Code 4901:1-37-09(D).

[10] Ohio Admin. Code 4901:1-37-09(D).

[11] Ohio Admin. Code 4901:1-37-09(E) (emphasis added).

[12] See R.C. 4928.17 (B).

B. The PUCO Should Reject DP&L's Proposal To Continue Charging Its Customers For Its Service Stability Rider If Sale Or Transfer Of DP&L's Generation Assets Occurs Before The End Of The Electric Security Plan Term.

In DP&L's ESP proceeding, the PUCO authorized DP&L to charge customers $110 million per year, from January 1, 2014 through December 31, 2016, for a Service Stability Rider ("SSR"), finding that "this is the minimum amount necessary to ensure the Company's financial integrity and provide the Company with the opportunity to achieve a reasonable ROE during the ESP."[13] The PUCO reached this conclusion based on its finding that "DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility."[14]

The PUCO also specified the conditions DP&L must meet before it can apply for approval of an extension of the term of the Service Stability Rider ("SSR-E) to continue charging customers until April 30, 2017.[15] The SSR-E would provide up to an additional

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[13] *DP&L ESP II*, Opinion and Order of September 4, 2013("September 4, 2013 Order") at 25.

[14] *Id. at 22.*

[15] *Id*. at 26-28. The PUCO has required that DP&L file an application for SSR-E 275 days before its effective date, *i.e.* by approximately March 31, 2016. DP&L must show that the SSR-E is necessary to maintain its financial integrity during the applicable period. In evaluating the SSR-E, the PUCO states that it will consider "any dividends paid to parent companies, as well as all other relevant financial information, including O&M savings undertaken and any capital expenditure reductions made by DP&L." The PUCO also required, as a condition of the SSR-E, that DP&L file an application for a distribution rate case by July 1, 2014. And the PUCO required the filing of an application for divestiture of DP&L's generation assets, i.e. this proceeding. Further, the PUCO required DP&L to modernize its electric distribution infrastructure through implementation of a smart grid plan and advanced metering infrastructure (AMI) by filing such application by July 1, 2014. Finally, DP&L was required to establish and begin implementation of a plan to modernize its billing system by filing a plan approved by Staff by December 31, 2014.

In its Second Entry on Rehearing the PUCO modified the provisions of the ESP set forth in its Order and its Entry *Nunc Pro Tunc*. Those modifications included that DP&L should divest its generation assents by no later than January 1, 2016, and the SSR-E term will be four months and end on its own terms on April 30, 2017. Second Entry on Rehearing at ¶51 (Mar. 19, 2014).

$36.66[16] million of customer money to DP&L for the first four months of 2017 if the SSR-E is authorized.[17]

But in its Supplemental Application in the instant proceeding, DP&L requests that it be authorized to continue to charge customers for the SSR until the end of the current ESP *regardless of whether it sells or transfers its generating assets*.[18] In support of this request, DP&L states that "[t]he Commission has ordered the divestiture of the generation assets without regard for market conditions."[19] DP&L further states that "[g]iven poor market conditions, DP&L could sustain a serious, continuing financial loss that strongly supports the ongoing need to recover the SSR throughout the term of the ESP."[20]

At the outset, the PUCO should recognize what is happening here. DP&L wants the PUCO to protect it from "poor market conditions." Having denied its Dayton-area customers the benefits of the low market prices that it finds to be poor conditions for its own profit, DP&L seeks to prolong the pain of its customers with more delay to market. Basically, DP&L is asking the PUCO to delay its full transition to market until it can make more profit and have its customers pay more. That's a bad idea for Ohioans.

Furthermore, DP&L's proposal for it to continue to collect the stability charge from customers beyond corporate separation is not appropriate and is inconsistent with

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[16] As noted in the preceding footnote, in its Second Entry on Rehearing, the PUCO reduced the SSR-E period to four months. *DP&L ESP II,* Second Entry on Rehearing at ¶51 (Mar. 19, 2014). Consequently, consistent with the PUCO's establishment of the potential upper limit of the SSR-E in its September 4, 2013 Order and its September 6, 2013 Entry *Nunc Pro Tunc*, the upper limit of the SSR-E would be 4 months of the annual SSR amount of $110 million, or $110 million * (4/12) = $36.66 million.

[17] *DP&L ESP II,* September 6, 2013 Entry *Nunc Pro Tunc* at 2.

[18] DP&L Supplemental Application at 3.

[19] *Id.*

[20] *Id.*

the PUCO's findings in its ESP proceeding. First of all the SSR is authorized only through the end of 2016, not till the end of the current ESP[21] (May 31, 2017), as claimed by DP&L.[22] Second, it is clear from the PUCO's Order of September 4, 2013, that once the generation assets are separated from DP&L, a stability charge such as the SSR can no longer be justified.

The PUCO's September 4, 2013 Opinion and Order[23] makes clear that the need for the SSR ends once structural separation occurs. In other words, with generation wholly separated from DP&L's regulated transmission and distribution operations, gains or losses by the former generation business are not gains or losses for DP&L's regulated utility operations. Thus, losses on the generation side can no longer be used as a justification for making customers pay a stability charge (not that OCC believed it was ever justified).

Moreover, to the extent that DP&L has any shortfall of earnings in its transmission or distribution operations that may impact its financial performance, DP&L can always file a request for a base rate increase – if it were reasonable and justified. In DP&L's ESP proceeding, however, DP&L's Chief Financial Officer, Mr. Jackson, testified that DP&L's transmission and distribution businesses are financially stable through the current ESP period.[24] Thus, at the time of the ESP proceeding, there was no need for a distribution rate increase. And certainly there is no need for a stability charge

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[21] *DP&L ESP II*, Second Entry on Rehearing at 31.

[22] *Id*.

[23] *DP&L ESP II*, September 4, 2013 Order at 22.

[24] *DP&L ESP II,* Transcript Volume I-public, at pages 117-118.

if the generation assets are transferred and the regulated operations of DP&L (transmission and distribution) are financially stable.

OCC would also emphasize that the PUCO ordered DP&L to file a distribution rate case by July 1, 2014, if DP&L intends to pursue an SSR-E for the period from January 1, 2017 to April 31, 2017.[25] Clearly, the PUCO found that an SSR could only be justified while DP&L can demonstrate a financial need and while the structural separation of generation from DP&L is still pending, which it has now ordered to occur by January 1, 2016.[26] Indeed, the PUCO noted in its Second Entry on Rehearing that any approval of an amount for collection under the SSR-E "will take into consideration the timing and disposition of DP&L's generation assets."[27] While the PUCO did not shorten the period of the SSR in its Second Entry on Rehearing, OCC intends to ask for rehearing of that issue (and others) in light of the fact that there is no justification for an SSR (or the SSR-E) after structural separation occurs and in light of the PUCO's previous statements to that effect.

With respect to DP&L's claim that "poor market conditions" would warrant continuation of the SSR through the term of the ESP even if structural separation occurs prior to that time, DP&L has failed to show that "poor market conditions" would affect the financial condition of DP&L's regulated and separated transmission and distribution ("T&D") business after the transfer of generation assets. Nor has DP&L even defined or described what it means by "poor market conditions." And DP&L provides no evidence of "poor market conditions" or their impact on DP&L's regulated T&D operations or

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[25] *DP&L ESP II,* September 4, 2013 Order at 27; Second Entry on Rehearing at 29 (Mar. 19, 2014).

[26] *DP&L ESP II,* Second Entry on Rehearing at 29 (Mar. 19, 2014).

[27] *Id.*

why any shortfall in earnings, if there was one, couldn't be addressed through a base rate proceeding.

DP&'L's claim that continuation of the SSR after structural separation occurs could be justified is specious and should be rejected.

C. DP&L's Proposal To Retain Responsibility For Future Environmental Liabilities And Its Request To Charge Customers For Clean-Up Costs For Property That "Had Been" Used And Useful Should Be Rejected.

DP&L next requests that it be authorized to "retain responsibility for future environmental liabilities associated with DP&L's historic ownership of its generation facilities."[28] And it also asks the PUCO to allow it "to seek recovery for prudently incurred environmental clean-up costs for real property that ***had been*** used and useful for the production of electricity" used to serve customers.[29] In addition, DP&L asks for accounting authority to defer costs of environmental clean-up or remediation.[30]

In order to charge customers for these costs, DP&L would have the PUCO break at least two laws. First, DP&L proposes that the PUCO authorize it to charge all customers (shopping and non-shopping) for the cost of a generation expense. That violates R.C. 4928.38, which specifies that a utility "shall be fully on its own in the competitive market" for generation after the end of its market development period. For DP&L, that period ended on December 31, 2005.[31]

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[28] DP&L Supplemental Application at 3-5.

[29] *Id.* at 4 (emphasis added).

[30] *Id*. at 4-5.

[31] *In the matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order (September 2, 2003).

To the best of OCC's knowledge, DP&L is the first Ohio electric utility to propose retaining environmental liabilities associated with the generating assets it plans to sell or transfer. And it is also the first Ohio electric utility to propose charging customers for environmental liabilities that it proposes to retain after selling or transferring the assets to an unregulated entity. Other Ohio electric utilities have apparently recognized that such a proposal neither would, nor should, pass the proverbial "smell test." Indeed, the PUCO specifically prohibited Ohio Power Company ("OPC"), without prior Commission approval, from guaranteeing, securing or otherwise assuming "liability or responsibility for any obligation of subsidiaries or affiliates that own generating assets."[32] And OPC assured the Commission "that all liabilities associated with the generating assets being transferred will be assumed by AEP Generation, including the liabilities associated with the retired plants."[33]

Second, DP&L would have the PUCO violate R.C. 4909.15, which allows charging customers for used and useful property only if the property is used and useful on the date certain. DP&L wants to go back in time and charge customers additional expenses for past service, service that DP&L itself accurately describes by the phrase "*had been* used and useful."[34] The law doesn't work that way. And DP&L wants to charge customers for plant that is not jurisdictional to the Utility's restructured status as an EDU under the 1999 and 2008 laws. That means it is not used and useful under R.C. 4909.15. It is not proper – and violates Ohio law -- to charge customers for costs related

[32] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan,* Case No. 11-5333-EL-UNC, Finding and Order of January 23, 2012, pp. 18-19.

[33] *Id.* at 19.

[34] DP&L Supplemental Application at 4 (emphasis added).

to facilities that are no longer used and useful in providing service to them.[35] Customers of the new generating company, not DP&L's distribution customers, should pay for these environmental costs through the price of generation service set in a competitive market.

Third, DP&L's proposal is nothing but a transfer of wealth from its distribution customers to its owners such as DPL Inc. and AES Corporation. The market value of DP&L's generating assets will be much higher if environmental liabilities are placed on the shoulders of DP&L's distribution customers. If proceeds from the sale of the generating assets are solely retained by DP&L, DP&L and its owners stand to gain. That gain could be significant, especially if DP&L is permitted to pass the costs of remediation and clean-up on to customers as DP&L has proposed here. Such a windfall at DP&L's distribution customers' expense would be wholly unjustified, especially when customers of DP&L have for many years paid a return on and a return of investment determined to be used and useful to serve them.

Fourth, DP&L's customers have already paid $441 million in stranded costs associated with DP&L's generating assets.[36] In calculating stranded costs, the market value of the generating assets (as determined by a discounted cash flow analysis) was developed by netting projected costs against projected revenues.[37] Included in these costs were projected "[p]ost-retirement net decommissioning costs" based on a 1998 Sargent and Lundy study of DP&L's generating facilities.[38] Thus, to the extent DP&L's

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[35] R.C. 4909.15(A)(1).

[36] *DP&L ESP II*, Direct Testimony of Ken Rose, Ph.D., OCC Exhibits 21 and 22.

[37] *See In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, pursuant to 4928.31, Revised Code and for the opportunity to receive transition revenues as authorized under 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, Direct Testimony of Ralph Luciani, pp. 15-20.

[38] *Id.*

generating facilities had "future environmental liabilities," they should have been accounted for either in DP&L's projected operating expenses for its generating facilities or net decommissioning costs utilized in the calculation of DP&L's stranded generation costs. Such costs should have been accounted for in the PUCO's determination of DP&L's stranded cost claim.

The time for DP&L to claim stranded costs has long since passed. Under R.C. 4928.38, DP&L must be "fully on its own in the competitive market." The PUCO cannot authorize DP&L to collect "transition revenues or any equivalent revenues." DP&L cannot seek to recoup any more stranded costs from customers after its market development period is over – and it has been over for more than eight years.[39]

Fifth, "future environmental liabilities" associated with generating assets are not chargeable to customers under Ohio law. Only the recurring costs of providing current distribution service to customers are properly utilized in establishing the ongoing level of rates to be charged to customers.[40] Since, upon sale or transfer, the environmental liabilities being addressed by DP&L will only relate to past services and will not constitute ongoing distribution service, there would be no basis to charge customers for these costs.[41]

Sixth, these costs are clearly related to the provision of generation service. Those costs associated with future environmental liabilities as retained by the new owner will be reflected in the market price of generation service. There is no valid reason to ask the customers of DP&L to pay twice for the same environmental liabilities. The provision of

[39] R.C. 4928.38.

[40] R.C. 4909.15(A)(4).

[41] *Id.*

generation service has been considered to be a competitive service which is not subject to regulatory oversight since the end of DP&L's market development period on December 31, 2005.[42]

It is wrong to continue to charge T&D customers for costs associated with providing competitive generation services. Doing so amounts to a subsidy of a competitive generation service by regulated distribution service. This is against one of the policies of the state -- to avoid anti-competitive subsidies – and it could result in undue preference or advantage to DP&L's affiliate if the facilities are transferred to DP&L's GenCo.[43]

Seventh, DP&L's proposal for accounting deferral of its "future environmental liabilities" should be rejected. Accounting standards do not control ratemaking outcomes by the PUCO. But, under Statement of Financial Accounting Standard No. 71, for utilities to book a deferred asset it must be "probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes."[44] However, at this point in time, DP&L has not even identified what it considers to be its "future environmental liabilities" or attempted to quantify them. Allowing deferrals of "future environmental liabilities" associated with the provision of generating facilities that are not used and useful in the provision of current distribution service, would violate ratemaking law and policy. Such relief should be denied.

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[42] R.C. 4928.38; R.C. 4928.03.

[43] See R.C. 4928.02(H) and R.C. 4928.17(A)(2) and (A)(3).

[44] Statement of Financial Accounting Standards No. 71.

Moreover, deferral authorization should be limited to "exigent circumstances" and for "good reason" as the PUCO has established in past cases, because such authorization is a departure from standard accounting procedures as provided by R.C. 4905.13.[45] Thus, in connection with FirstEnergy's request for deferral of an estimated $450 million in distribution expenses projected to be incurred from 2006-2008, the PUCO stated:

> Standard application of public utility rate making and accounting policies would require that ordinary expenses incurred by a regulated public utility must be recovered, if at all, through annual revenues. The instant proposal, as it relates to the capitalization and deferral of distribution related expenses is a departure from those generally recognized policies. Although the granting of such deferral authority is within the discretion of the Commission, we believe that to approve such a measure requires that we find there to be both exigent circumstances and good reason demonstrated before such amounts should be treated differently from ordinary utility expenses. In the current case, because the companies are clearly in need of significant and costly improvements to their infrastructure, including vegetation management practices, maintenance practices, and storm damage repairs, we believe that it is important for the utilities to be encouraged through regulatory incentives to quickly accomplish those improvements. Thus, we find that exigent circumstances exist to deviate in a controlled way from the above stated public utility regulatory principles.[46]

These principles have been recognized and confirmed by the Supreme Court of Ohio.[47] Thus, utilities requesting deferral authorization must demonstrate both exigent circumstances and good reason why the amounts should be treated differently from

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[45] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Generation Charge Adjustment Rider*, 05-704-EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, Opinion and Order (Jan. 4, 2006), *aff'd in part and rev'd in part, and remanded (aff'd in relevant part,) Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St.3d 305; 2007-Ohio-4164; 871 N.E.2d 1176; [hereinafter *"Elyria Foundry" case].*

[46] *Id.*

[47] *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St.3d at 310-312., 2007-Ohio-4164.

ordinary utility expenses.[48] Furthermore, the costs must be subject to review before they are incorporated into rates, ensuring the costs are reasonable, appropriately incurred, clearly and directly related to the exigent circumstances for which they were authorized, and in excess of expense amounts already included in the rates of the utility. [49]

DP&L has not made a showing of "exigent circumstances" or "good reason," in addition to the fact that collection of these expenses would violate both R.C. 4909.15 and R.C. 4928.38, as discussed above. DP&L's proposals to retain future environmental liabilities associated with generating assets that will be sold or transferred as well as for an accounting deferral to provide for later collection of such costs should be rejected.

D. DP&L Should Not Be Permitted to Charge Customers Costs Associated With Selling Or Transferring Generation Assets, Including "Financing Costs, Redemption Costs, Amendment Fees, Investment Banking Fees, Advisor Costs, Taxes, And Related Costs."

DP&L next requests authorization to collect from distribution customers costs associated with the sale of the generating assets. DP&L identifies these costs as

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[48] While the Supreme Court of Ohio recognized that FirstEnergy had not demonstrated exigent circumstances for approval of deferral, it found that current rates are not affected by the accounting deferrals and other parties could challenge the recovery of deferred distribution expenses in FirstEnergy's next distribution rate cases. The Supreme Court emphasized that "[t]he commission made it clear that "deferred amounts will be reviewed before they are incorporated into future rates" and thus the "commission's accounting order was not conclusive for ratemaking purposes." *Elyria Foundry, citing Cincinnati v. Pub. Util. Comm.*, 63 Ohio St.3d 366, 588 N.E.2d 775 (1992) (no prejudice resulting from an accounting order having a ratemaking effect where rate proceeding was still pending and appellant had a right of appeal). The Supreme Court of Ohio also emphasized that the commission provided "a process to ensure that the deferred expenses for improvements to and maintenance of its infrastructure are in fact necessary costs related to improving the reliability of its distribution system." The Supreme Court stated that the "commission will scrutinize these deferred expenses to determine whether the 'costs to be deferred are reasonable, appropriately incurred, clearly and directly related to specifically necessary infrastructure improvements and reliability needs of [FirstEnergy], and in excess of expense amounts already included in the rate structures of each of the [FirstEnergy] Companies.'" Among other things, the Court noted that the commission required FirstEnergy to establish separate accounts for each project for which they proposed to defer expenses and that commission staff would then review the reasonableness and necessity of the deferred expenses in those accounts annually.

[49] *Id.*

"financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes, and related costs that it incurs to comply with the Commission's Order that DP&L separate its generation assets."[50] DP&L argues that the Commission should grant this request "because DP&L will incur those costs to comply with that Order."[51] DP&L states that "[c]osts related to separation incurred exclusively by the GenCo will be borne by the newly formed GenCo entity."[52]

It is not clear what collection mechanism DP&L intends to use to collect these "costs" for the transfer of generation assets. Nevertheless, DP&L's request for customers to pay for these costs after the transfer of generation assets is complete, is inconsistent with the treatment of generating assets separately from T&D services. And it is violative of Ohio's ratemaking policy, which only allows collection of recurring expenses associated with providing current distribution services through a base distribution rate proceeding.[53] Moreover, it would create precedent inconsistent with previous PUCO holdings.

OCC notes that the PUCO previously held in an Ohio Power Company ("OPC") Corporate Separation proceeding that "[g]eneration-related costs associated with implementing corporate separation shall not be recoverable from customers."[54] There is no basis for treating costs related to selling or transferring DP&L's generation assets

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[50] DP&L Supplemental Application at 5.

[51] *Id.*

[52] *Id.*

[53] R.C. 4909.15(A)(4).

[54] *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan,* Case No. 11-5333-EL-UNC, Finding and Order of January 23, 2012, p. 19.

differently than generation-related costs associated with implementing OPC's corporate separation plan.

Moreover, although DP&L emphasizes the fact that the Commission ordered DP&L to separate its generating assets in its recent ESP proceeding, in fact DP&L is under a statutory mandate[55] to do so and has only been given temporary authority (for some 14 years) to postpone its divestiture. The mere fact that the PUCO orders a utility to take particular actions does not mean that the utility is entitled to charge customers the costs it incurs to comply with a particular mandate.

Setting rates by solely looking at costs associated with a single mandate is inconsistent with sound ratemaking policy. While the General Assembly has authorized the PUCO to include "provisions regarding single issue ratemaking" for a utility's distribution service, as part of an electric security plan,[56] it has not otherwise authorized single issue ratemaking in any other context. The presumption should be that such charges outside of ESP proceedings are not consistent with ratemaking law and policy.

Even in the context of an ESP, PUCO authorization of such single issue ratemaking for infrastructure modernization can only be authorized where the utility proves that it is meeting the provisions of R.C. 4928.148(B)(2)(h).[57] DP&L does not address the ESP standards. DP&L's proposal to charge customers for financing and other costs associated with sale or transfer of generating assets should be rejected.

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[55] R.C. 4928.17.

[56] R.C. 4928.143(B)(2)(h).

[57] *Id*.

E. DP&L's Proposal To Retain Its Interest In OVEC, To Defer OVEC Costs And To Subsequently Charge Customers For Such Costs, Should Be Rejected.

DP&L owns 4.9% of Ohio Valley Electric Corporation ("OVEC"). Although DP&L has been under a statutory mandate to divest its generating assets since Senate Bill 3 was enacted in 1999, DP&L – as well as other Ohio electric utilities - was party to OVEC's Amended and Restated Inter-Company Power Agreement dated September 10, 2010 that extended this power supply arrangement to June 30, 2040.[58]

DP&L also states that it "has no expectation that it will be successful in obtaining" the consents required to allow it "to transfer its ownership interest in OVEC to a stand-alone GenCo" given "the recent experience of other OVEC Sponsoring Companies being unable to obtain the necessary consents from other OVEC members."[59] Therefore, DP&L "asks that it be permitted to retain its interest in OVEC," as well as its "rights and obligations" under the Restated Inter-Company Power Agreement. Although DP&L does not ask "that any of the retail rate issues relating to OVEC be resolved in this proceeding," it asks the Commission to grant it accounting authority to defer costs associated with OVEC which are not currently being collected through DP&L's fuel rider, along with carrying costs at "its most recently approved cost of debt."

The PUCO should reject DP&L's request to defer costs associated with OVEC. Under Statement of Financial Accounting Standard No. 71, to book a deferred asset, it must be "probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes."[60]

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[58] DP&L Supplemental Application at 6.

[59] *Id*.

[60] Statement of Financial Accounting Standards No. 71.

However, absent any proposed ratemaking treatment and a review of the basis for such proposal, it is premature for the PUCO to allow deferral of any OVEC costs.

And at this time, the PUCO doesn't even know upon what grounds DP&L will claim such costs for ratemaking purposes in the future. Indeed, DP&L has neither provided an adequate definition of the costs involved, quantification of such costs, or a procedure by which DP&L's claim to collect these costs from customers will be considered by the PUCO. Nor has it provided any sound reason why costs associated with any generating assets should continue to be charged to distribution customers.

As discussed above, deferral authorization should be limited to "exigent circumstances" and for "good reason," as the PUCO has found and as confirmed by the Supreme Court of Ohio, because such authorization is a departure from standard accounting procedures as provided by R.C. 4905.13.[61] DP&L has failed to make any showing justifying such treatment here.

Furthermore, discovery and an evidentiary hearing are necessary to determine why the OVEC Sponsoring Companies are preventing their fellow OVEC members from transferring their ownership interest to an affiliated GenCo, or sale of their ownership interest. Prior to allowing DP&L's continued ownership of its interest in OVEC, the PUCO should ensure that DP&L has taken all reasonable measures to sell or transfer its interest in these generating assets, consistent with R.C. 4928.17. And, as discussed above, it should reject DP&L's proposal for deferral accounting.

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[61] *See In the Matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Generation Charge Adjustment Rider*, 05-704-EL-ATA, 05-1125-EL-ATA, 05-1126-EL-AAM, and 05-1127-EL-UNC, Opinion and Order (Jan. 4, 2006), *aff'd in part and rev'd in part, and remanded* ***(aff'd in relevant part)*** *Elyria Foundry Co. v. Public Util. Comm'n of Ohio,* 114 Ohio St. 3d 305; 2007-Ohio-4164; 871 N.E.2d 1176; [hereinafter *"Elyria Foundry" case].*

F. DP&L's Proposal To Authorize It To Increase Its Long-Term Debt. To $750 Million Or 75% Of Rate Base, Whichever Is Greater, Should Be Rejected.

DP&L asks that the PUCO permit it to vary from the terms of a PUCO approved stipulation at Case No. 11-3002-EL-MER[62], requiring it to maintain a capital structure consisting of at least 50% equity.[63] DP&L explains that the PUCO's order for DP&L to separate its generation assets by May 31, 2017 will likely cause its equity ratio to "fall below the 50% level in the course of the debt restructuring necessary to achieve separation."[64] Consequently, DP&L asks that the Commission authorize it "to maintain the greater of, (i) total debt of up to $750 million or (ii) total debt equal to 75% of ratebase at the time of separation."[65]

DP&L at first asks the PUCO "to maintain these debt levels for a limited period of time in order to allow DP&L to restructure its debt and effectuate the full legal separation of its generation assets, regardless of whether that transfer is made to an affiliate or a sale to a third party."[66] But then it asks for the PUCO to extend these permissions "through at least 2018, after which further debt reductions will be conditioned on market recovery and an ability to reallocate debt to its non-regulated affiliate."[67]

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[62] *In the Matter of the Application of the AES Corporation, Dolphin Sub, Inc., DPL Inc. and the Dayton Power and Light Company for Consent and Approval for a Change of Control of the Dayton Power and Light Company*, Case No. 11-3002-EL-MER, Finding and Order (Nov. 22, 2011)(DP&L Merger Case).

[63] DP&L Supplemental Application at 7-9.

[64] *Id.*at 7-8.

[65] *Id.* at 8.

[66] *Id.*

[67] *Id.*

DP&L is, in reality, now seeking rehearing of the Commission's Order in its Merger Case that adopted the Stipulation. However, DP&L did not apply for rehearing of the PUCO's November 22, 2011 Order in that case within the 30-day time period required by R.C. 4903.10. The PUCO should treat DP&L's request as a late-filed application for rehearing. Because DP&L did not file its application in accordance with R.C. 4903.10, the PUCO lacks jurisdiction to consider the application.[68]

Moreover, DP&L never explains how or why effectuating full legal separation will require DP&L's equity ratio to fall below the 50% level required by the approved Stipulation at Case No. 11-3002-EL-MER. Prior to the PUCO's approval of any such request, DP&L should be required to provide a detailed explanation of how and why this may occur and any adverse effects of such significant leveraging on DP&L's operations. Further, any possible impacts on rates or ratemaking should also be explained. Additionally, once a substantive application is filed, a full hearing should be held, preceded by ample opportunity for discovery.

G. DP&L's Request For Waiver Of A Hearing Is Premature In The Absence Of A Specific Proposal For Sale Or Transfer, And It Should Be Rejected, Especially In Light Of DP&L's Additional Requests For Special Ratemaking Treatment.

As discussed in OCC's initial comments, DP&L's request for waiver of a hearing is premature in the absence of a specific proposal for sale or transfer. And since DP&L's Supplemental Application lacks the necessary specificity, it continues to be premature for the PUCO to consider such waiver requests.

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[68] *Greer v. Pub. Util. Comm*. (1961), 172 Ohio St. 361; *Dover v. Pub. Util. Comm.* (1933), 126 Ohio St. 438. See In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18, et al., Case No. 12-2400-EL-UNC, Opinion and Order at 32 (Feb. 13, 2014) (denying the utility's application on the basis that that the utility was seeking rehearing of a PUCO approved stipulation, outside the 30 day time frame of R.C. 4903.10).

Moreover, DP&L's new proposals would significantly impact customer rates and, therefore, require a hearing on the justness and reasonableness of such proposals. To the extent the PUCO intends to consider such rate requests, a hearing should be held to consider such proposals, preceded by ample opportunity for discovery consistent with the PUCO's rules and Ohio law.[69]

III. CONCLUSION

DP&L's Supplemental Application falls significantly short of PUCO requirements. Like DP&L's initial application, DP&L's supplemental application should be rejected by the PUCO. Moreover, the PUCO should reject all of DP&L's rate-related proposals while directing such issues be subject to a full hearing, preceded by ample opportunity for discovery. DP&L's requests that a hearing be waived should be rejected.

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[69] See R.C. 4903.082; Ohio Admin. Code 4901:1-16.

CERTIFICATE OF SERVICE

I hereby certify that a copy of *Comments* was served on the persons stated below via electronic transmission to the persons listed below, this 25th day of March, 2014.

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