

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY COMMENTS ON DP&L'S SUPPLEMENTAL APPLICATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

On March 25, 2014, numerous parties, including OCC, filed Comments regarding the many adverse effects on customers’ rates that Dayton Power & Light Company’s (“DP&L” or “Utility”) Supplemental Application for Sale or Transfer of Generation Assets (“Supplemental Application”) would likely have. Although the Supplemental Application was supposed to provide details of DP&L’s proposed sale or transfer of its generation assets to an unregulated affiliate or unregulated third party, the application lacked any such details. For this reason, in its Comments, OCC had urged the PUCO to reject DP&L’s Supplemental Application and require it to file an application that meets legal requirements.¹

Notwithstanding the lack of details provided, OCC commented previously that DP&L’s Supplemental Application is objectionable and not in the public interest. Under DP&L’s application the rates customers pay will increase. DP&L’s proposal also violates the letter and intent of Ohio’s restructuring law by seeking to continue subsidies for

¹ OCC Comments at 3, 22.

competitive retail generation services² at the expense of customers paying for regulated transmission and distribution services. Because DP&L's application is unreasonable and unlawful, OCC requested that the PUCO conduct a full evidentiary hearing before ruling on DP&L's application.³

The comments submitted by most parties,⁴ are consistent on many points with OCC's Comments on DP&L's Supplemental Application. The points of agreement among some, or all, of these parties, include:

- (1) DP&L's Supplemental Application is insufficient and/or violative of O.A.C. 4901:1-37-09(C), making it impossible for parties to conduct a proper review of the application;⁵
- (2) Continuation of DP&L's Service Stability Rider ("SSR") after sale or transfer of generation assets would be unlawful and unreasonable;⁶
- (3) Costs associated with the sale or transfer of DP&L's generations assets ("divestiture costs") are not proper to

² The service stability rider of DP&L, approved by the PUCO in DP&L's electric security plan proceeding, Case No. 12-426-EL-SSO, is a subsidy of the utility's generation business by all customers.

³ OCC Comments at 21-22.

⁴ FirstEnergy Solutions ("FES"), Industrial Energy Users-Ohio ("IEU-Ohio"), Ohio Energy Group ("OEG"), Ohio Manufacturers Association Energy Group ("OMA"), Ohio Partners for Affordable Energy ("OPAE"), and The Staff of the Public Utilities Commission of Ohio ("Staff").

⁵ OCC Comments at 1-3; FES Comments at 1-3; IEU-Ohio Comments at 1-5; OEG Comments at 7-9; OPAE Comments at 1-2; Staff Comments at 1-2, 7.

⁶ OCC Comments at 5-9; FES Comments at 2-3; IEU-Ohio Comments at 7-8; OEG Comments at 1-4.

charge customers⁷ or should only be considered after corporate separation is complete;⁸

- (4) DP&L's proposal to retain unspecified environmental liabilities associated with its generating assets, to recover environmental clean-up costs, and/or to defer such costs to a future rate proceeding should be denied;⁹
- (5) DP&L's proposal to retain its Ohio Valley Electric Corporation "OVEC" assets and/or defer costs associated with such assets should be denied;¹⁰
- (6) DP&L's proposal to increase its debt ratio beyond that agreed to previously should be denied;¹¹ and
- (7) DP&L's request for waiver of a hearing should be denied, at least until a further supplemental filing is made.¹²

While OCC is in accord with these parties on these important points, there are areas in which OCC's position diverges from some other positions of some commenters. Primarily these differences concern which customers should pay the costs DP&L seeks to charge customers, if such costs are permitted. The PUCO should reject the positions

⁷ OCC Comments at 15-17; OEG Comments at 6; RESA Comments at 4-5; Staff Comments at 3-4. (indicating that DP&L should receive the same treatment with respect to such costs as AEP Ohio, which was denied recovery of such costs).

⁸ FES Comments at 3.

⁹ OCC Comments at 9-15; IEU-Ohio Comments at 8-14; OEG Comments at 4-6; OMA Comments at 3-6; OPAE Comments at 1-3; Staff Comments at 3.

¹⁰ OCC Comments at 18-19; IEU-Ohio Comments at 14-18; Staff Comments at 4-5.

¹¹ OCC Comments at 20-21; FES Comments at 3-4; IEU-Ohio Comments at 18-20; Staff Comments at 5-7.

¹² OCC Comments at 21-22; FES Comments at 8; IEU-Ohio Comments at 20-24; OEG Comments at 7-9; OMA Comments at 6; OPAE Comments at 1, 3; Staff Comments at 7.

taken by some parties that OVEC costs,¹³ environmental clean-up costs,¹⁴ and divestiture costs¹⁵ (to the extent such charges are permitted) should be charged only to SSO customers rather than to all customers through non-bypassable charges.

II. REPLY COMMENTS

A. Commenters Agree That DP&L's Supplemental Application Lacks Necessary Details To Make A Proper Review And That A Hearing Will Be Necessary To Consider The Impacts On Consumers From DP&L's Many Rate-Related Proposals.

Consistent with OCC's Comments, other parties emphasized the insufficiency of DP&L's Supplemental Application.¹⁶ The absence of any details, let alone specific terms and conditions, of a transaction makes it nearly impossible for any party to assess the merits of DP&L's Application or Supplemental Application.¹⁷ As many parties noted, neither the identity of the parties to the transaction, the timing of the transaction, or the price (and other terms) of the transaction have been stated.¹⁸

Further, as the PUCO Staff specifically commented, the Supplemental Application does not address the treatment of sale proceeds, allocation of bonds and refinancing costs, or the impact of corporate separation on DP&L's financial integrity.¹⁹ The absence of these details makes the application, including the Supplemental

¹³ Direct Energy Comments at 2; IEU-Ohio Comments at 15-16.

¹⁴ RESA Comments at 2-3.

¹⁵ OEG Comments at 6; RESA Comments at 2, 4.

¹⁶ OCC Comments at 1-3; FES Comments at 1-3; IEU-Ohio Comments at 1-5; OEG Comments at 7-9; OPAE Comments at 1-2; Staff Comments at 1-2, 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Staff Comments at 2.

Application, violative of the law and the PUCO's rules and prior order.²⁰ And DP&L's application is also fundamentally different than other utilities' divestiture applications in proposing a sale or transfer at fair market value, raising new considerations.²¹ The filing should be rejected or DP&L must make a further supplemental application that meets legal requirements.

And DP&L's application, including its Supplemental Application, also requires a hearing as requested by most parties.²² As indicated by the Staff, DP&L's application is "much more vague and multi tentacles" than either AEP or Duke's cases and it is, therefore, premature to grant any hearing waiver.²³ Thus, although DP&L's waiver request is premature in light of its insufficient application, DP&L's numerous rate-related requests alone compel a hearing on the factual basis and policy justification for such claims, and the eventual disposition of the generation assets.

B. OCC Agrees With The Positions Of IEU-Ohio And OEG That Continuation Of DP&L's Service Stability Rider, Which Would Produce SSO Generation Rates That Are Higher-Than-Market After Corporate Separation, Would Be An Unjust And Unreasonable Charge To Customers.

IEU-Ohio and OEG have argued that, in light of the record in DP&L's ESP case, it would be unjust and unreasonable for the SSR to continue after DP&L sells or transfers its generation assets.²⁴ OCC agrees. As the record cited by OEG makes clear, DP&L's

²⁰ See OCC Comments at 1, citing R.C. 4928.17, Ohio Admin. Code 4901:1-37-09, and *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*].

²¹ FES Comments at 6-7; Staff Comments at 1.

²² OCC Comments at 21-22; FES Comments at 8; IEU-Ohio Comments at 20-24; OEG Comments at 7-9; OMA Comments at 6; OPAE Comments at 1, 3; Staff Comments at 7.

²³ Staff Comments at 7.

²⁴ IEU-Ohio Comments at 7-8; OEG Comments at 1-4.

transmission and distribution businesses would remain financially stable after divestiture.²⁵ Consequently, since the SSR is based on the PUCO's factual premise adopted in the ESP II proceeding that it is needed for financial integrity, there is no reason for continuing the SSR when DP&L would no longer own the generation assets. (In OCC's view, there was never a reason to make Ohioans pay hundreds of millions of dollars for this charge.)

FES pointed out that a transfer occurring earlier than January 1, 2016, would affect the determination of SSO rates. In accordance with the ESP II Order, ESP II rates are supposed to be based on a blending of DP&L's legacy generation rates and energy and capacity purchased through its competitive bid auctions until January 1 2016.²⁶ But if DP&L completes the sale or transfer earlier, it will not be able to provide any energy or capacity through its former generation assets, i.e. all of its energy and capacity will have to be purchased in the competitive market (unless it is permitted to retain some of those assets). Thus, to the extent that an earlier transfer is in fact contemplated by DP&L, it must address in an amended supplemental application the conditions under which generation rates will be set.

C. If Any Costs Relating To Future Environmental Liabilities Are Permitted To Be Collected From Customers, Which OCC Opposes, All Customers Should Pay, Not Just SSO Customers.

Numerous parties commented that DP&L should not be permitted to retain environmental liabilities, charge regulated customers for such environmental liabilities,

²⁵ OEG Comments at 2, citing Case No. 12-426-EL-SSO, Tr. Vol. I at 150. *See also* OCC Comments at 5-9.

²⁶ FES Comments at 4-5.

or defer costs related to such environmental liabilities.²⁷ Consistent with its initial comments on this issue, OCC agrees.

OCC would, in particular, note its agreement with IEU-Ohio's and OEG's reliance on the PUCO's prior decision requiring AEP-Ohio to demonstrate that its customers "have not and will not incur any costs associated with the cost of servicing" debt associated with environmental liabilities and to hold ratepayers harmless from such costs.²⁸ OCC also agrees with those parties that recommend that until any potential environmental liabilities are specified, the PUCO should deny this request as lacking sufficient detail.²⁹ And OCC agrees with IEU-Ohio's argument that, per R.C. 4928.05, accounting authority cannot be granted under R.C. 4905.13 with respect to the provision of competitive retail electric services, i.e. generation.³⁰

OCC fundamentally disagrees with the Retail Energy Supply Association's (RESA) Comments that environmental clean-up costs associated with DP&L's generation assets should only be charged to SSO customers and not to shopping customers.³¹ Contrary to RESA's position, "future environmental liabilities" associated with generation assets transferred to an unregulated affiliate or an unaffiliated third party are not associated with SSO generation service. Consequently, these unwarranted fees

²⁷ OCC Comments at 9-15; IEU-Ohio Comments at 8-14; OEG Comments at 4-6; OMA Comments at 3-6; OPAE Comments at 1-3; Staff Comments at 3.

²⁸ IEU-Ohio Comments at 11-12, *quoting In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 59 (Aug. 8, 2012) ; OEG Comments at 5.

²⁹ IEU-Ohio Comments at 8-14; OEG Comments at 4-6; OMA Comments at 3-6; OPAE Comments at 1-3; Staff Comments at 3.

³⁰ IEU Comments at 12-14.

³¹ RESA Comments at 3-4.

should not be charged to either SSO customers or shopping customers. And, to the extent the costs are not associated with providing current service through assets that are used and useful during the test year, they cannot be charged to customers under the law.³²

Moreover, although DP&L has provided no details of these liabilities to date, to the extent that there are any liabilities, it is likely that the liabilities relate to the provision of generation service over many years, during a time when most customers were DP&L generation service customers. Therefore, these liabilities, that likely accrued during the period of service to the vast majority of DP&L's customers, should be spread over the broadest possible base of customers on a non-bypassable basis.

D. To The Extent Any OVEC Costs Are Permitted To Be Charged To Customers, The Charge Should Be Non-Bypassable.

Like OCC, IEU-Ohio and the PUCO Staff also argued against charging customers for any costs associated with OVEC.³³ They questioned the proposal in light of DP&L's failure to provide details regarding the magnitude of the costs or attribution of any off-system sales margins against such costs.³⁴ And they pointed to the lack of evidence that DP&L had sought to transfer its interest in OVEC under the terms of the Amended and Restated Intercompany Power Agreement.³⁵ OCC agrees.

Direct Energy, IEU-Ohio and RESA also argue that costs related to OVEC should be bypassable by shopping customers.³⁶ Direct Energy argues that DP&L's existing ESP "was approved based on the assumption that all generation would be sold or divested."

³² R.C. 4909.15.

³³ OCC Comments at 18-19; IEU-Ohio Comments at 14-18; Staff Comments at 4-5.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Direct Energy Comments at 2; IEU-Ohio Comments at 15-16.

And Direct Energy claims that to charge any costs to shopping customers associated with OVEC “would throw off the assumptions used to determine whether the ESP was more favorable in the aggregate than the expected market rate offer.”³⁷

IEU-Ohio argues that based on R.C. 4928.02(H), charging shopping customers for OVEC would be anti-competitive because it would cross-subsidize the EDU’s generation business segment.³⁸ RESA argues that it would be “contrary to statute and unfair” for shopping customers to “pay for DP&L’s generation costs as well as the generation costs of their suppliers.”³⁹

To the extent any OVEC costs are permitted, such unjustified charges should be allocated to both SSO and shopping customers (i.e., if DP&L is permitted to retain these assets and charge any above-market amount to customers). DP&L’s OVEC obligations date back many years to a time when all customers were captive generation customers and, by default, may have received electricity produced by OVEC. If the PUCO were to authorize DP&L to retain the OVEC assets despite the fact that these generating assets are above-market, the PUCO would be making an overt decision to subsidize DP&L to the detriment of all customers. Moreover, if DP&L is forced to retain the OVEC assets because there is no OVEC shareholder consent, any above-market costs would result from the restructuring of utility services and not from serving SSO customers. Consequently, if any above-market OVEC costs are permitted to be charged to customers, such unwarranted charges should be rendered to all customer classes on a non-bypassable basis.

³⁷ Direct Energy Comments at 2.

³⁸ IEU-Ohio Comments at 15-16.

³⁹ Direct Energy Comments at 4.

E. Costs Of Divestiture Should Not Be Permitted To Be Charged To DP&L Customers But, If Any Charge Is Permitted, The Charge Should Be Non-Bypassable.

A number of parties have joined OCC in opposing DP&L's proposal to defer costs associated with divestiture and to charge customers those costs in a later proceeding.⁴⁰ And, as the PUCO Staff has commented, DP&L's proposal that costs exclusive to the acquiring GenCo would be paid by the GenCo is "fraught with interpretational concerns, especially when coupled with the broad, undefined, terms and conditions of the asset transfer authorization which DP&L seeks in its Application."⁴¹ But OEG and RESA have also proposed that, to the extent divestiture costs are permitted to be charged to customers, the charges should be bypassable to shopping customers.⁴²

To the extent divestiture costs are permitted to be charged to customers, these charges should be non-bypassable. Divestiture costs are not associated with the provision of current generation service to customers but are attributable to the restructuring of utility services and the separation of generation from transmission and distribution.

F. DP&L's Proposal To Finance Its Generation Asset Sale Or Transfer By Increasing Its Debt Is Problematic.

A sale or transfer of DP&L's generation may bring in substantial cash or equity capital to DP&L's regulated operations. This will happen if the value exceeds the debt associated with the generating assets. But in its Supplemental Application, DP&L forecasts a potential need to increase its debt burden. This potential increase in debt burdens of DP&L may suggest, as FES, IEU-Ohio and Staff have noted, that DP&L plans

⁴⁰ OCC Comments at 15-17; OEG Comments at 6; RESA Comments at 4-5; Staff Comments at 3-4.

⁴¹ Staff Comments at 3-4.

⁴² OEG Comments at 6; RESA Comments at 2, 4.

to retain liabilities or debts associated with its generating assets while transferring the assets.⁴³ As these parties have noted, such a plan of retaining liabilities associated with its generating assets is problematic and not in the best interest of its customers, in addition to the fact that DP&L's plans are once again extremely vague.⁴⁴

Furthermore, as both FES and the Staff emphasize, transfer of DP&L's debt secured by the generating assets to the purchaser or transferee is essential to DP&L's long term financial health.⁴⁵ Thus, absent a clear showing of necessity and lack of alternatives to retention of debts or liabilities associated with the generating assets, and a PUCO determination that rates will not be permitted to be affected by retention of liabilities, this request should be denied.⁴⁶ Finally, OCC supports the Staff's position that DP&L, if it is permitted to maintain a higher debt ratio, should be required to maintain positive retained earnings and should be prohibited from paying dividends during such time frame.⁴⁷

III. CONCLUSION

Comments submitted by many of the parties in this case express concerns similar to, or the same as, those raised by OCC for Dayton-area consumers that DP&L would burden with further rate increases. DP&L's Supplemental Application falls significantly short of legal and regulatory requirements. Consequently, DP&L's supplemental

⁴³ FES Comments at 3-4; IEU-Ohio Comments at 6; Staff Comments at 5-6.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Staff Comments at 6.

application should be rejected by the PUCO. And DP&L's rate-related proposals are contrary to sound ratemaking law and policy.

Such issues, as well as any appropriate application to be subsequently filed, must be subject to a full hearing, preceded by ample opportunity for discovery. DP&L's request that a hearing be waived should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Comments* was served on the persons stated below via electronic transmission to the persons listed below, this 7th day of April, 2014.

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