

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
Dayton Power and Light Company to) Case No. 14-0358-EL-RDR
Update its Transmission Cost Recovery)
Rider – Non-Bypassable)

In the Matter of the Application of The)
Dayton Power and Light Company for) Case No. 14-0423-EL-WVR
the Waiver of Certain Commission)
Rules)

In the Matter of the Revised, PUCO)
Tariff No. 17, updated schedules to) Case No. 14-0661-EL-RDR
reflect proposed Transmission Cost)
Recovery Rider – Bypassable and PJM)
RPM Rider rates effective June 1, 2014)

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Rule 4901:1-36-06(F), Ohio Administrative Code (“O.A.C”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby files its Comments to the Amended Application filed by The Dayton Power and Light Company (“DP&L”) on May 1, 2014, in Case Nos. 14-358-EL-RDR, *et al.*, regarding the Transmission Cost Recovery Rider – Non-Bypassable (“TCRR-N”), and DP&L’s Application to Modify its TCRR-Bypassable (“TCRR-B”) tariffs filed in Case No. 14-661-EL-RDR on May 1, 2014. Through these two filings (collectively referred to herein as “DP&L’s proposal”), DP&L unlawfully and unreasonably seeks to transfer millions of dollars to shopping customers associated with market-based transmission charges incurred by DP&L to serve DP&L’s standard service offer (“SSO”) customers.

DP&L's proposal should be rejected because it unlawfully and unreasonably seeks to have shopping customers subsidize market-based transmission service provided to SSO customers. DP&L's proposal should also be rejected because it violates the prohibition on retroactive ratemaking by seeking to retroactively make shopping customers responsible for charges DP&L incurred to provide service to SSO customers. Finally, DP&L's proposal amounts to an untimely application for rehearing and collateral attack on the Public Utilities Commission of Ohio's ("Commission") September 4, 2013 Opinion and Order in Case Nos. 12-426-EL-SSO, *et al.* Because DP&L's proposal is unlawful and unreasonable, it should be rejected.

I. BACKGROUND

In Case Nos. 12-426-EL-SSO, *et al.*, the Commission approved DP&L's current SSO, which takes the form of an electric security plan ("ESP").¹ At DP&L's request and over IEU-Ohio's objection, the Commission granted DP&L authority to restructure how transmission service is procured on behalf of customers in DP&L's certified distribution service area.² In the ESP Order, the Commission granted DP&L authority to, beginning January 1, 2014, procure what was labeled as non-market-based transmission service on behalf of all customers (both shopping and non-shopping customers) in DP&L's certified distribution service area. The non-market-based transmission charges billed to DP&L by PJM Interconnection LLC ("PJM") are collected through the TCRR-N.

¹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order (Sept 4, 2013) ("ESP Case" or "ESP Order" where appropriate).

² ESP Order at 36.

DP&L procures market-based transmission service on behalf of SSO customers only. DP&L collects revenue from SSO customers through the bypassable TCRR-B to cover the market-based transmission charges billed to DP&L by PJM. Competitive retail electric service (“CRES”) providers secure market-based transmission service on behalf of the shopping customers they serve. A shopping customer’s contract with its CRES provider governs the payment responsibility for the market-based transmission service that is procured on the shopping customer’s behalf.

The existing TCRR had an under-recovery balance as of December 31, 2013, and DP&L assigned the existing under-recovery associated with the TCRR to the TCRR-B and TCRR-N. The TCRR-N was assigned 68.1% of the under-recovery balance for the expiring TCRR, or \$3.873 million.³ The TCRR-B was assigned the remaining 31.9% of the existing TCRR under-recovery balance, or \$1.814 million.⁴

In the *ESP Case*, DP&L also requested authority to make under-recovery balances associated with the TCRR-B non-bypassable if the TCRR-B under-recovery balance exceeded 10% of the TCRR-B base rates. The Commission, however, explicitly rejected DP&L’s request for authority to transfer TCRR-B under-recoveries to the non-bypassable TCRR: “[t]he Commission finds that the TCRR should be removed from the RR.”⁵ DP&L did not seek rehearing of the Commission’s denial of authority to

³ *In the Matter of the Application of the Dayton Power and Light Company to Update its Transmission Cost Recovery Rider – Non-bypassable*, Case Nos. 14-358-EL-RDR, *et al.*, Amended Application at Workpaper C-1b (May 1, 2014) (“The January 2014 First of Month Balance is 68.1% of the December 2013 TCRR End of Month Balance.”) (hereinafter “*DP&L TCRR-N Case*”).

⁴ *In the matter of the Revised, PUCO Tariff No. 17, updated schedules to reflect proposed Transmission Cost Recovery Rider - Bypassable and PJM RPM Rider rates effective June 1, 2014*, Case No. 14-661-EL-RDR, Application at Workpaper 1a, Page 1 of 2 (May 1, 2014) (“The January 2014 First of Month Balance is 31.9% of the December 2013 TCRR End of Month Balance.”) (hereinafter “*DP&L TCRR-B Case*”).

⁵ ESP Order at 36 (emphasis added). The Reconciliation Rider (“RR”) is a non-bypassable rider.

transfer TCRR-B balances to a non-bypassable rider if the TCRR-B balance exceeded 10% of the base rate of the TCRR-B.

This past winter market prices spiked in the PJM region. The price spikes affected the market prices for energy as well as market-based transmission services. The spikes in market prices were due to several conditions including severe weather conditions and forced generation outages.⁶ The price spikes affected all Load Serving Entities (“LSEs”) in PJM who purchased energy and market-based transmission service in PJM’s markets during the periods when prices had spiked. Both DP&L and CRES providers are LSEs in PJM. Accordingly, the impact from the higher than expected market-based transmission charges extends beyond DP&L’s SSO and affected all CRES providers who procured market-based transmission service on behalf of shopping customers in DP&L’s certified distribution service area.

During the months of January, February, March, and April 2014, the TCRR-B under-recovery grew from \$1.814 million to \$12.339 million.⁷ DP&L projects the TCRR-B under-recovery balance to decrease slightly to \$12.275 million through the end of May 2014.⁸ DP&L requests authority to transfer the TCRR-B under-recovery balance that exceeds 10% of the base revenue requirement of the TCRR-B to the TCRR-N under-recovery balance.⁹ DP&L claims that the base revenue requirement for the TCRR-B is \$3.876 million.¹⁰ Thus, DP&L seeks to transfer \$11.887 million (\$12,274,541 -

⁶ PJM, *Analysis of Operation Events and Market Impacts During the January 2014 Cold Weather Events* (May 9, 2014), available at: <http://www.pjm.com/~media/documents/reports/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx>.

⁷ *DP&L TCRR-B Case*, Application at Workpaper 1a, Page 1 of 2.

⁸ *Id.*

⁹ *DP&L TCRR-N Case*, Amended Application at 2.

¹⁰ *DP&L TCRR-B Case*, Application at Schedule 1.

\$387,560) from recovery through the bypassable TCRR-B to recovery through the non-bypassable TCRR-N.

As mentioned above, the price spikes also affected CRES providers serving shopping customers in DP&L's certified distribution service area. The payment responsibility for market-based transmission service procured by CRES providers on behalf of shopping customers in DP&L's certified distribution service area ultimately depends on each customer's contract with its CRES provider. Some shopping customers may have contracts where the customer is responsible for market-based transmission charges, placing the risk and reward of price fluctuations on the customer. Conversely, some shopping customers may have entered into a fixed price contract that transfers the risk (or reward) of price fluctuations in market-based transmission services to the CRES provider (often the customer pays a premium in the fixed price for transferring this risk to the CRES provider). As evidenced by announcements made by FirstEnergy Solutions, Inc. ("FES"), CRES providers have in fact incurred the higher than expected price spikes and have plans to flow through these higher than expected charges to at least some shopping customers.

On May 19, 2014, Commission Staff ("Staff") filed a review and recommendation regarding DP&L's proposal and recommended it be rejected: "As a result of Staff's recommendation in regard to DP&L's proposal to shift TCRR-B costs into the TCRR-N, Staff recommends to the Commission that the amended application filed in Case No. 14-358-EL-RDR on May 1, 2014 should be denied."¹¹

¹¹ "DP&L TCRR-B Case, Staff Review and Recommendations at 2 (May 19, 2014).

II. ARGUMENT

A. **DP&L's proposal would unlawfully and unreasonably require shopping customers to subsidize the market-based transmission service provided to SSO customers between January and May 2014**

DP&L's proposal is unlawful and unreasonable because it would result in shopping customers subsidizing market-based transmission service provided to SSO customers. In support of its proposal, DP&L claims that moving \$11.887 million in revenue recovery from the bypassable TCRR-B to the non-bypassable TCRR-N is needed to prevent a detrimental outcome to customers.¹² DP&L's claim, however, is only based on the potential impact to SSO customers. Once the complete picture is taken into account, it is readily apparent that DP&L's proposal is not necessary and would unlawfully and unreasonably cause shopping customers to further subsidize DP&L's SSO.¹³

Initially, DP&L's proposal should be rejected because it is based upon an incomplete premise. In DP&L's certified distribution service area over 68% of customers were shopping as of December 31, 2013.¹⁴ As discussed above, the increased rates for market based transmission service as a result of the price spikes (that led to the large TCRR-B under-recovery balance) were charged to all LSEs (both

¹² *DP&L TCRR-N Case*, Amended Application at 2.

¹³ The Commission has authorized DP&L to charge shopping customers a non-bypassable Service Stability Rider ("SSR") that is based, in part, to protect DP&L's earnings erosion from increases in shopping. DP&L has also received authority to move certain under-recoveries associated with market-based services provided to SSO customers to the non-bypassable Reconciliation Rider ("RR-N") if the under-recoveries exceed 10% of the base rate of the riders. DP&L has acted upon this authority, and on May 1, 2014 requested authority to move \$5.11 million associated with SSO service to the non-bypassable RR-N.

¹⁴ *Summary of Electric Customer Choice Switch Rates in Terms of Sales, 4th Quarter Ending December 31, 2013*, available at: <http://www.puco.ohio.gov/emplibrary/files/util/MktMonitoringElecCustSwitchRates%5CSWITCH%20RATE%20SALES%5C2013%5C4Q2013.pdf>.

DP&L and CRES providers) in DP&L's certified distribution service area. Thus, the "detriment" referenced in DP&L's Amended Application is not unique to SSO service.

Furthermore, and regardless of whether CRES providers and shopping customers were also exposed to the higher prices for market-based transmission service, DP&L's proposal would unlawfully and unreasonably require shopping customers to subsidize service to SSO customers. Section 4928.02(H), Revised Code, provides that it is the policy of the state to "[e]nsure 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." (emphasis added). DP&L's proposal violates this provision and should, therefore, be rejected.

The \$11.887 million that DP&L proposed to transfer to the TCRR-N is related to market-based transmission service that was provided to SSO customers only between January and May 2014. In accordance with DP&L's proposed bifurcation of transmission service that the Commission approved in the *ESP Case*, CRES providers procured market-based transmission service for shopping customers during the period of January through May 2014. During this time, shopping customers paid their CRES providers for procuring market-based transmission service on their behalf. DP&L's proposal seeks to transfer the costs DP&L incurred to provide SSO customers with market-based transmission service to shopping customers for whom DP&L did not secure market-based transmission service. Thus, DP&L's proposal would require shopping customers to subsidize the market-based transmission service that DP&L procured for SSO customers during January through May 2014. Accordingly, DP&L's

proposal should be rejected because it would amount to an unlawful and unreasonable anticompetitive subsidy in violation of Section 4928.02(H), Revised Code.

In an almost identical situation, the Commission rejected Duke Energy Ohio, Inc.'s ("Duke") proposal to modify its supplier cost reconciliation rider ("Rider SCR") from a bypassable to non-bypassable rider if the under-recovery of Rider SCR reached a certain threshold, finding the proposal would violate Section 4928.02(H), Revised Code. In support of its proposal, Duke claimed that if the rider did not become non-bypassable it would "drive[] up the SSO price and encourage[] additional customer switching. In that case, ... there would be fewer customers and less load in succeeding billing periods to recover the SCR deferral balance."¹⁵ Staff opposed Duke's proposal.¹⁶ The Commission adopted Staff's recommendation and reasoned that true-ups of bypassable riders cannot be collected on a non-bypassable basis "under any circumstances" because it "would create an anticompetitive subsidy" in violation of Section 4928.02(H), Revised Code.¹⁷ The Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."¹⁸

The Commission strayed from the precedent established in the *Duke MRO Case* in a case involving an under-recovery balance of Ohio Power Company's ("AEP-Ohio")

¹⁵ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 61 (Feb. 23, 2011) ("*Duke MRO Case*").

¹⁶ *Id.* at 62.

¹⁷ *Id.* at 63.

¹⁸ *Id.* at 57.

TCRR.¹⁹ The Commission held that it was reasonable to deviate from its precedent because AEP-Ohio's bypassable under-recovery balance was created at a time of little shopping (10%), and at the time of the true-up, shopping had increased significantly (to 40%). Thus, implicit in the Commission's holding was a finding that the under-recovery balance was caused, in part by shopping customers. IEU-Ohio has appealed this case and the Commission's deviation from the precedent established in the *Duke MRO Case*. Nonetheless, the factual circumstances that the Commission's AEP-Ohio TCRR Order was based upon do not exist here. Shopping was already significant in DP&L's territory as of January 2014 (68%) and did not increase significantly by May 2014 based upon DP&L's projections (75%).²⁰ Accordingly, the under-recovery balance associated with DP&L's TCRR-B is not a result of customer switching and the under-recovery balance is not associated with service provided to customers who are now shopping.

In a more recent case involving DP&L, the Commission rejected DP&L's request for a switching tracker ("ST"), because, among other things, the ST was anticompetitive, violated state policy, and would have interfered with customer choice:

The Commission finds that the ST should be denied because it violates the policies of the state of Ohio, is anticompetitive, and would discourage further development of Ohio's retail electric services market. Further, the Commission finds that the Company has not demonstrated that the ST, which would be incrementally increased when customers leave the SSO, is related to default service under Section 4928.143(B)(2)(d), Revised Code. One of the principal aspects of a market is the opportunity for consumers to shop for a diversity of products offered by a multitude of suppliers. When a customer purchases a product from a new supplier, the previous supplier will necessarily lose that customer's representative

¹⁹ *In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates*, Case No. 12-1046-EL-RDR, Opinion and Order (Oct. 24, 2012).

²⁰ The 75% shopping statistic is based upon DP&L's projections in the TCRR-B and TCRR-N filings in these proceedings. DP&L projected total kilowatt-hour ("kWh") sales for June 2014 of 1,178,644,850 (Workpaper C-3 supporting TCRR-N calculations) and SSO sales for June 2014 of 300,200,028 kWh (Workpaper 4 supporting TCRR-B calculations).

market share. DP&L's proposed ST would provide DP&L a stream of revenue to directly compensate it for market share lost when a customer switches to a competitive retail electric service provider. The Commission believes that this makes the proposed ST anticompetitive because it may discourage customers from shopping for a retail electric supplier.²¹

Although the ST and DP&L's proposal in these proceedings are not identical,²² DP&L's proposal in these proceedings would have the same anticompetitive effect as the ST.

The Commission held that the ST was anticompetitive because it would discourage further market development by requiring shopping customers to be beholden to pay the electric distribution utility ("EDU") (through a non-bypassable charge) for market-based services provided to SSO customers. In the case of the ST, the market-based service was generation service. DP&L's proposal in these proceedings similarly asks shopping customers to pay the EDU through a non-bypassable charge for market-based services provided to SSO customers; in this case, market-based transmission service. Thus, just like the ST, DP&L's proposal to transfer \$11.887 million of market-based transmission charges to the non-bypassable TCRR-N would result in an anticompetitive subsidy that violates Section 4928.02(H), Revised Code.

Accordingly, the Commission should reject DP&L's proposal because it is anticompetitive and may discourage customers from shopping for a retail electric supplier.

B. The Commission must reject DP&L's proposal because it would result in retroactive ratemaking

²¹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 30 (Sept. 4, 2013).

²² The ST would have provided DP&L additional revenue unauthorized by law, whereas DP&L's proposal in this case seeks to recover costs that DP&L is legitimately entitled to collect (although DP&L's proposed collection methodology is unlawful and unreasonable).

DP&L's proposal to bill shopping customers for market-based transmission charges it incurred to provide market-based transmission service to SSO customers this winter, amounts to retroactive ratemaking and is prohibited under Ohio law. Accordingly, the Commission must reject DP&L's proposal.

If approved, DP&L's proposal will transfer payment responsibility for approximately \$11.887 million from SSO customers to all customers. By shifting the revenue responsibility for a portion of the \$11.887 million to shopping customers, DP&L proposes to retroactively increase shopping customers' rates for service previously rendered to SSO customers between January and May 2014. DP&L was not authorized to charge shopping customers for market-based transmission charges during this timeframe. Thus, for all shopping customers, DP&L's proposal increases their electricity rates to retroactively recover a portion of the \$11.887 million associated with market-based transmission previously incurred by DP&L to provide SSO customers with market-based transmission service between January and May 2014. While shopping customers are responsible for addressing their own market-based transmission service (through their contracts with their CRES providers), they will also be held responsible to pay for a portion of the market-based transmission charges of SSO customers.

The increase of shopping customers' rates to collect the \$11.887 million under-recovery balance results in retroactive ratemaking. "[U]tility ratemaking by the Public Utilities Commission is prospective only."²³ The prospective nature of utility ratemaking; however, also allows for reconcilable riders if authorized by statute. In this instance, the transmission cost recovery riders are authorized under Section 4928.05(A)(2), Revised

²³ *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

Code, which provides that the Commission may authorize a reconcilable rider. Thus, a transmission rider, such as the TCRR-B, may be reconcilable.

That statutory authorization, however, does not include authority to invent a new and previously unauthorized reconciliation mechanism. As the Supreme Court stated in *Lucas County*,²⁴ the Commission's authority to reconcile a rate for past under- or over-recovery must be incorporated in the initial rate approved by the Commission.²⁵ As DP&L concedes in its Amended Application, the Commission has not provided DP&L any authority to transfer the under-recovery balance from the TCRR-B to the TCRR-N.²⁶ (In fact, the Commission rejected DP&L's proposal to transfer under-recoveries associated with the TCRR-B to another non-bypassable rider, the RR-N.²⁷) Because the existing authority²⁸ for the TCRR-B and TCRR-N did not provide for a reconciliation mechanism that would allow a bypassable TCRR-B under-recovery to be reconciled on a non-bypassable basis, the Commission has no lawful basis to assign a revenue responsibility to shopping customers for the market-based transmission service provided to SSO customers and collected through the TCRR-B.

In sum, DP&L's proposal to collect on a non-bypassable basis the market-based transmission charges previously incurred by DP&L to serve SSO customers would result in unlawful retroactive ratemaking. The result of the retroactive increase is that shopping customers are being asked to subsidize market-based transmission service provided to SSO customers after the shopping customers have already been required to

²⁴ 80 Ohio St.3d at 348.

²⁵ *Id.* at 348.

²⁶ Amended Application at 2.

²⁷ ESP Order at 36.

²⁸ *Id.*

address market-based transmission service provided to shopping customers from their CRES providers. Because the Commission has no authority to authorize the retroactive recovery of the under-recovered market-based transmission charges by moving the recovery of this under-recovery to a separate rider, the Commission must reject DP&L's proposal.

C. DP&L's proposal should be rejected because it amounts to an untimely application for rehearing and collateral attack on the ESP Order in violation of Section 4903.10, Revised Code

DP&L's proposal should be rejected because it amounts to an untimely application for rehearing and collateral attack on the ESP Order. As discussed above, in the *ESP Case*, DP&L sought authority to recover on a non-bypassable basis any under-recovery balances associated with the TCRR-B that exceeded 10% of the TCRR-B base rates. The Commission rejected DP&L's proposal in the ESP Order.

Section 4903.10, Revised Code, provides affected parties 30 days to seek rehearing of an order of the Commission. DP&L, however, failed to seek rehearing on this issue in the *ESP Case*. The only difference between what DP&L proposed in the *ESP Case* and what DP&L proposes here is the name of the non-bypassable rider where DP&L seeks to transfer the TCRR-B under-recovery balance. Because the Commission already rejected the substance of DP&L's proposal, and DP&L failed to seek rehearing of the ESP Order, the Commission should reject, as an untimely application for rehearing, DP&L's proposal in these proceedings.

III. CONCLUSION

As discussed herein, DP&L's proposal to have shopping customers subsidize and pay a portion of SSO customers' market-based transmission charges is unlawful

and unreasonable for several reasons. DP&L's proposal should be rejected because it would amount to an unlawful and unreasonable anticompetitive subsidy that violates Section 4928.02(H), Revised Code. Further, the Commission cannot authorize DP&L's proposal because it would amount to unlawful retroactive ratemaking. Finally, DP&L's proposal should be rejected because it amounts to an untimely application for rehearing from the ESP Order. Accordingly, IEU-Ohio requests that the Commission reject DP&L's proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 23rd day of May 2014, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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