

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan	:	Case No. 16-0395-EL-SSO
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs	:	Case No. 16-0396-EL-ATA
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In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13	:	Case No. 16-0397-EL-AAM
	:	

**THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION TO INDUSTRIAL ENERGY USERS-OHIO'S
MOTION FOR AN ORDER DENYING THE REQUEST FOR WAIVER OF THE
REQUIREMENT THAT TRANSMISSION COSTS BE
RECOVERED THROUGH A BYPASSABLE RIDER AND RELATED ORDERS**

I. INTRODUCTION AND SUMMARY

In this proceeding, DP&L asked the Commission to waive Ohio Adm. Code 4901:1-36-04(B) to allow DP&L to continue to recover the Transmission Cost Recovery Rider ("TCRR-N"). The Commission has twice previously approved the implementation of a TCRR-N for DP&L to recover certain transmission costs that PJM charges directly to DP&L. Staff has reviewed DP&L's request for approval of the TCRR-N in another proceeding, and recommended that it be approved. Every other Ohio utility has a mechanism substantially similar to DP&L's TCRR-N.

Nevertheless, in its motion in this case, IEU-Ohio argues that the TCRR-N is preempted by FERC and asks the Commission to reject DP&L's request for a waiver. The Commission should reject IEU-Ohio's arguments for the following separate and independent

reasons: (1) the Commission has previously considered that argument and approved the TCRR-N; (2) the Commission has held that the preemption issue is a constitutional issue for the judiciary; and (3) IEU's proposal is not practical.

II. THE COMMISSION SHOULD AGAIN REJECT IEU-OHIO'S ARGUMENT

DP&L's tariff in this case seeks approval of the TCRR-N to recover transmission-related costs imposed on or charged to DP&L by FERC or PJM. DP&L Tariff Sheet No. T8 (PUCO No. 18). In DP&L's application in this case, DP&L sought a waiver of the requirement in Ohio Adm. Code 4901:1-36-04(B) that all transmission costs be recoverable on a bypassable basis, since those particular transmission costs were billed to DP&L by PJM regardless of whether a particular customer received generation service from DP&L. February 22, 2016 Application, ¶ 61.

The Commission should reject IEU-Ohio's argument regarding DP&L's request for a TCRR-N for the following separate and independent reasons:

1. IEU should be barred from re-litigating this issue: In DP&L's prior ESP case, DP&L sought approval of the TCRR-N and a waiver of Ohio Adm. Code 4901:1-36-04(B). December 12, 2012 Second Revised Application, ¶¶ 20-22 (Case No. 12-426-EL-SSO). The Commission approved DP&L's requests. September 4, 2013 Opinion and Order, p. 36 (Case No. 12-426-EL-SSO).

In Case No. 15-0361, DP&L filed an application to implement the TCRR-N. March 16, 2015 Application of DP&L (Case No. 15-0361). IEU opposed DP&L's Application, arguing that DP&L's Application was preempted by FERC. April 27, 2015 Comments of IEU-

Ohio, pp. 10-15 (Case No. 15-0361). IEU's comments in that matter were substantially identical – and frequently word-for-word identical – to its motion in this matter. Compare April 27, 2015 Comments of IEU-Ohio, pp. 10-15 (Case No. 15-0361) with Motion of IEU, pp. 3-16 (Case No. 16-395).

In that prior matter, the Commission's Staff reviewed DP&L's Application, and recommended that it be approved. May 8, 2015 Staff's Review and Recommendations, pp. 1-2 (Case No. 15-361). In its Order, the Commission described IEU's preemption argument, and approved DP&L's TCRR-N despite that argument. May 20, 2015 Finding and Order, pp. 2-4 (Case No. 15-361).

IEU did not raise its FERC preemption argument in Case No. 12-426, and did not seek rehearing on that issue in either Case No. 12-426 or Case No. 15-361. The Commission should thus conclude that IEU is barred from continuing to litigate this issue. R. C. 4903.10. The doctrine of collateral estoppel also bars IEU from continuing to litigate this issue. Aug. 24, 2005 Entry, pp. 3-4 (Case No. 05-886-EL-CSS) ("The Ohio Supreme Court has confirmed that 'where an administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.'") (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St.2d 133 (1980), syllabus); Feb. 13, 2014 Opinion and Order, p. 26 (Case No. 12-2400-EL-UNC) ("There is no dispute that the doctrine of res judicata, through the form of collateral estoppel, precludes the relitigation of a second action of an issue that has been actually and necessarily determined in a prior action. In addition, it is undisputed that collateral estoppel applies to administrative proceedings before the Commission."); Feb. 2, 2015 Entry, p. 3 (Case No. 15-796-TR-CVF) ("The Commission finds

that Quality Carriers is precluded from raising the same issues in this proceeding that were previously decided in Quality Carriers 1 under the doctrines of res judicata and collateral estoppel.").

2. The issue is for the judiciary: Even if IEU were entitled to re-litigate this issue, the Commission should conclude that it is a judicial issue that the Commission should not decide. Specifically, in a recent AEP case, the Commission approved a transmission rider that was substantially identical to what DP&L seeks here. IEU argued in that case that the transmission rider sought by AEP was preempted. May 28, 2015 Second Entry on Rehearing, p. 30 (Case No. 13-2385-EL-SSO). The Commission approved AEP's request for a transmission rider, despite IEU's preemption argument, stating "The Commission likewise declines to address IEU-Ohio's preemption argument with respect to the [transmission rider], as constitutional issues are best reserved for judicial determination." *Id.* at 31. The Commission has approved similar transmission riders for other Ohio utilities.¹

Consistent with its precedent for every other Ohio utility, the Commission should approve DP&L's request for a waiver of Ohio Adm. Code 4901:1-36-04(B) and should approve DP&L's request for a TCRR-N.

3. IEU's request is impractical: The authorization of a rider such as the TCRR-N is not simple. In order to implement the rider, DP&L notified CRES providers and auction supplier winners long in advance that non-market-based transmission-related services should not be included in their market-based products. DP&L then had to work with every other supplier to

¹ August 25, 2010 Opinion and Order, pp. 12, 47 (Case No. 10-388-EL-SSO); May 25, 2011 Opinion and Order, pp. 4, 17 (Case No. 11-2641-EL-RDR); February 25, 2015 Opinion and Order, pp. 65-68 (Case No. 13-2385-EL-SSO).

ensure that PJM charges/credits for the appropriate non-market-based services would be transferred from supplier accounts to DP&L's account. Multiple auctions were held to supply SSO load for future fixed terms, where the competitively bid prices did not reflect any non-market-based costs.

All of this work cannot simply be undone easily. Indeed, if the Commission ruled as IEU argues, that decision would effectively reverse the same decision in every utility territory in the state, which would have significant impacts upon the competitive market in Ohio.

Further, IEU argues (p. 2) that it should be able to purchase Network Integration Transmissions Service from PJM. However, DP&L's TCRR-N collects for numerous items in addition to NITS. DP&L Tariff Sheet T8 (PUCO No. 18). DP&L's billing system is programmed to bill all of DP&L's customers for all of these expenses. There would need to be significant and costly modifications to DP&L's billing system to allow a few isolated customers to purchase NITS directly from PJM.

For these reasons, DP&L respectfully requests that the Commission reject IEU's argument, approve the TCRR-N and grant DP&L its requested rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power & Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion for an Order Denying the Request for Waiver of the Requirement that Transmission Costs be Recovered Through a Bypassable Rider and Related Orders, has been served via electronic mail upon the following counsel of record, this 28th day of March, 2016:

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Summary: Memorandum The Dayton Power and Light Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion for an Order Denying the Request for Waiver of the Requirement that Transmission Costs be Recovered Through a Bypassable Rider and Related Orders electronically filed by Mr. Jeffrey S Sharkey on behalf of The Dayton Power and Light Company