

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 16-395-EL-RDR
for Approval of Its Electric Security Plan)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 16-396-EL-ATA
for Approval of Revised Tariffs)	

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 16-397-EL-AAM
for Approval of Certain Accounting)	
Authority Pursuant to Ohio Rev.)	
Code §4905.13)	

**REPLY OF INDUSTRIAL ENERGY USERS-OHIO
TO THE DAYTON POWER AND LIGHT COMPANY'S
MEMORANDUM IN OPPOSITION**

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TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	3
A. DP&L fails to establish any legal basis for a waiver of the requirement that its transmission rider be bypassable	3
B. There is no lawful basis for the Commission to defer the determination that DP&L's proposed transmission tariff sheets do not comply with federal and state requirements.....	5
C. IEU-Ohio is not estopped from arguing that the waiver should be denied	9
D. DP&L must comply with the rule even if it is "impractical" unless the Commission lawfully grants a waiver. Furthermore, the reasons DP&L identifies are unrelated to the prospective waiver it seeks in this case.....	11
II. CONCLUSION.....	12

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Rule 4901:1-36-04(B), Ohio Administrative Code (“O.A.C.”), requires an electric utility’s transmission rider to be bypassable. In its Application in this case, The Dayton Power and Light Company (“DP&L”) seeks a waiver of the rule and requests that the Public Utilities Commission of Ohio (“Commission”) authorize a nonbypassable transmission rider as part of DP&L’s next Electric Security Plan (“ESP”). In the Application, it offers no basis for the requested waiver except that it is requesting continued authorization of the Transmission Cost Recovery Rider-Nonbypassable (“TCRR-N”).

On March 11, 2016, Industrial Energy Users-Ohio (“IEU-Ohio”) moved for a Commission order denying the requested waiver because the request was unlawful and failed to demonstrate good cause for the waiver. Additionally, IEU-Ohio requested that the Commission order DP&L to revise and refile proposed transmission tariff sheets that provide for a bypassable transmission tariff rider and that do not include terms and conditions that permit DP&L to bill and collect for transmission services in a manner that conflicts with the provisions of the PJM Interconnection, LLC (“PJM”) Open Access Transmission Tariff (“OATT”).¹

On March 28, 2016, DP&L filed a memorandum contra opposing the motion.² Instead of addressing the legal requirements necessary to obtain its requested waiver or the merits of IEU-Ohio’s arguments, DP&L argued that the Commission should defer to the judiciary the determination of whether the Commission’s actions are consistent with federal law.³ DP&L further argued that IEU-Ohio is estopped from challenging DP&L’s request for a waiver because the Commission has previously granted DP&L a waiver of Rule 4901:1-36-04(B), O.A.C.⁴ Finally, DP&L argued that compliance with the law is impractical.⁵ Each claim is baseless, and none of the assertions satisfies the requirements to obtain a waiver of Rule 4901:1-36-04(B), O.A.C. Accordingly, the

¹ Motion by Industrial Energy Users-Ohio for an Order Denying the Request for Waiver of the Requirement that Transmission Costs be Recovered Through a Bypassable Rider and Related Orders and Memorandum in Support at 1 (Mar. 11, 2016) (“IEU-Ohio Motion”).

² 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 (Mar. 28, 2016) (“DP&L Memo Contra”).

³ DP&L Memo Contra at 4.

⁴ *Id.* at 2-4.

⁵ *Id.* at 4-5.

Commission should grant IEU-Ohio's Motion and direct DP&L to file proposed transmission tariff sheets that conform to Ohio and federal law.

I. ARGUMENT

A. DP&L fails to establish any legal basis for a waiver of the requirement that its transmission rider be bypassable

As part of Ohio's efforts to restructure its regulation of retail electric service, Ohio law and the Commission's rules require that retail electric services provided by an electric distribution utility ("EDU") be unbundled.⁶ Regarding the unbundled transmission component, R.C. 4928.05(A)(2) authorizes the Commission to provide for the recovery through a reconcilable rider in an EDU's rates, all transmission and transmission-related costs, imposed on or charged to the utility by the Federal Energy Regulatory Commission ("FERC") or a regional transmission organization ("RTO"), independent system operator ("ISO"), or similar organization approved by FERC.⁷ Both that section and R.C. 4928.15(B) require that the Commission conform transmission tariffs to federally-approved transmission tariffs. As set out in R.C. 4928.15(B), "*except as preempted by federal law*, no electric utility shall supply the transmission service ... in this state on or after the starting date of [competition] except pursuant to a schedule for that service component that is consistent with state policy specified in section 4928.02 of the Revised Code" (emphasis added). Thus, the General Assembly has directed the Commission to ensure that the transmission tariffs it approves are not preempted by federal law.

⁶ R.C. 4928.02(B), 4928.31 to 4928.40.

⁷ R.C. 4928.05(A)(2).

To implement these statutory requirements, the Commission has adopted rules governing the authorization of transmission riders. Rule 4901:1-36-04(B), O.A.C, provides, “[t]he transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers.”

As demonstrated in IEU-Ohio’s Motion, federal law vests in FERC the exclusive jurisdiction to set the transmission rates of retail customers in states that have adopted retail choice on terms and conditions it has authorized.⁸ Under the rules adopted in FERC Orders 888 and 2000, FERC has authorized retail customers in a region that is part of an RTO to take service directly under the OATT under the terms and conditions provided by the OATT.⁹ As also noted in IEU-Ohio’s Motion, the PJM OATT provides that any transmission service customer can contract directly with PJM for transmission service. Further, that customer will be billed for Network Integrated Transmission Services (“NITS”) and other services on a single coincident peak (“1CP”) basis.¹⁰

Despite these state and federal requirements, however, DP&L, which is a member of PJM, seeks a waiver of Rule 4901:1-36-04(B), O.A.C., and authorization of tariff sheets for its proposed nonbypassable transmission rider, under which DP&L’s customers would be prohibited from directly accessing the OATT.¹¹ Further, embedded in its proposed transmission tariff sheets, DP&L proposes to charge for transmission services in a

⁸ IEU-Ohio Motion at 3-9; *N.Y. v. FERC*, 535 U.S. 1 (2002).

⁹ IEU-Ohio Motion at 4.

¹⁰ IEU-Ohio Motion at 7-9.

¹¹ IEU-Ohio Motion at 12-13.

manner inconsistent with the manner authorized by FERC.¹² As IEU-Ohio explained in its Motion, the Commission cannot lawfully authorize this request since the Commission is bound by Ohio and federal law to permit customers to take service directly or indirectly from PJM at terms and conditions that are as good as or better than those provided by the PJM OATT.

Although DP&L must demonstrate that the waiver it seeks is not precluded by a statutory provision, it has not done so. As noted in IEU-Ohio's Motion, the Application requesting the waiver is completely devoid of any demonstration that DP&L's request complies with Ohio law. In its Memo Contra, DP&L again fails to address the requirements of Ohio or federal law. At this point, the Commission may accept that DP&L concedes that the Commission is required by federal and state law to authorize terms and conditions in the retail tariff sheets that comply with the PJM OATT, and that the proposed transmission tariff sheets do not satisfy these legal requirements. DP&L offers nothing to refute those conclusions.

B. There is no lawful basis for the Commission to defer the determination that DP&L's proposed transmission tariff sheets do not comply with federal and state requirements

Rather than address the merits of its request to implement transmission tariff sheets that do not comply with the PJM OATT, DP&L argues that the Commission should allow a court to decide whether authorization of its proposed transmission tariff sheets is preempted. In support of that claim, DP&L cites to a recent Commission decision in which the Commission held that "constitutional issues are best reserved for judicial

¹² IEU-Ohio Motion at 7-9, 13-15.

determination.”¹³ The Commission’s recent refusal to address the preemption issues raised in the Ohio Power Company (“AEP-Ohio”) case, however, was not consistent with Ohio law, was not consistent with Commission practice in other recent cases, and was premised on a misapplication of the Supreme Court’s holding that the Commission is without authority to hold a statute unconstitutional.

Initially, R.C. 4928.05(B) and 4928.15(B) require the Commission to find that the transmission tariff sheets are not preempted by federal law. Thus, the Commission, under state law, must address the preemptive effect of the PJM OATT and in this instance determine that DP&L’s proposed transmission tariff sheets conflict with the PJM OATT.

Moreover, the Commission routinely takes into account constitutional requirements when crafting its decisions, often at the behest of utility companies, including DP&L. In cases in which federal preemption is an issue, in particular, the Commission has also repeatedly addressed preemption issues before it renders its decisions.

For example, in an AEP-Ohio rate case during the 1980’s, the Commission held that the issue of whether it was preempted from taking certain actions was a threshold issue that it must address:

Ohio Power's position throughout the case has been that this Commission is federally preempted from considering the Transmission Agreement after it has been filed with FERC. Consumers' Counsel agreed with staff that the Commission should not allow the Transmission Agreement expense, but instead of relying on the staff's prudence argument, it urged the Commission to deny the expense because Ohio Power failed to show that the agreement is cost-based and because the Commission lacks the authority to approve a rate subject to refund.

¹³ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Second Entry on Rehearing at 31 (May 28, 2015).

The issue of this Commission's jurisdiction over the Transmission Agreement must be resolved prior to consideration of other issues.¹⁴

The Commission went on to conclude that it was preempted from excluding the transmission expense that its Staff and the Office of the Ohio Consumers' Counsel ("OCC") had urged be excluded.¹⁵

In a more recent case, the Commission analyzed whether its regulation of AEP-Ohio's compensation for capacity service was preempted by federal law.¹⁶ In that case, the Commission discussed parties' arguments for and against preemption and reviewed applicable federal law, federal regulations, federal tariffs, and FERC-approved contracts.¹⁷ Ultimately, the Commission concluded that while "pursuant to the FPA, electric sales for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC" that its exercise of jurisdiction in that case was "consistent with the governing section of the [FERC-approved contract]."¹⁸

DP&L itself has often urged the Commission to address constitutional issues including whether its actions would be preempted. In its prior ESP case and specific to whether the Commission may address whether it is preempted from acting, DP&L urged the Commission to find it was preempted from addressing certain issues raised in the

¹⁴ *In the Matter of the Application of Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 85-726-EL-AIR, Opinion and Order at 72 (July 10, 1986).

¹⁵ *Id.* at 80.

¹⁶ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012).

¹⁷ *Id.* at 9-14.

¹⁸ *Id.* at 13.

case.¹⁹ DP&L also has urged the Commission to consider whether an unconstitutional takings would occur if the Commission did not grant DP&L the relief it has sought.²⁰

Moreover, Supreme Court decisions addressing the Commission's authority to address constitutional issues hold only that the Commission may not declare that an Ohio statute is unconstitutional. In *East Ohio Gas Co. v. Public Utilities Commission of Ohio*, 137 Ohio St. 225, 239, 28 N.E.2d 599 (1940), the Court held that the "[c]onstitutionality of statutes is a question for the courts and not for a board or commission." In *Office of the Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550, 1994-Ohio-469 (1994), the Court confirmed a half century after its decision in *East Ohio Gas* that "[a]n administrative agency such as the commission may not pass upon the constitutionality of a statute." As the Court further explained in *Consumers' Counsel*, "nothing precludes the commission from passing upon the proper application or construction of a statute."²¹ Thus, the Court clearly distinguished between the Commission's authority to declare a statute unconstitutional, a power it does not possess, and the Commission's authority to interpret and apply a statute in the context of constitutional concerns, a power it does possess.

In sum, IEU-Ohio's Motion seeks a determination by this Commission that the Application seeks authorization of transmission tariffs that do not comply with state or

¹⁹ *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.*, The Dayton Power and Light Company's Reply Brief at 10 (June 5, 2013).

²⁰ Direct Testimony of Roger A. Morin at Ex. RAM-2, pages 11-13 (summarizing the foundation of the constitutional takings analysis set forth in the United States Supreme Court's *Hope* and *Bluefield* decisions and urging the Commission to take into account this constitutional principle in authorizing DP&L's return on equity).

²¹ *Consumers' Counsel*, 70 Ohio St.3d at 248.

federal law. The Motion does not seek a determination that any Ohio statute is unconstitutional. Under Ohio law, the Commission is required to conform the transmission riders it authorizes to the requirements of federal law to ensure its orders are not subject to preemption under the Supremacy Clause of the Constitution. Accordingly, there is no lawful or reasoned basis for the Commission to defer to the judiciary the determination that the request for a waiver of Rule 4901:1-36-04(B), O.A.C., is unlawful.

C. IEU-Ohio is not estopped from arguing that the waiver should be denied

As part of its effort to avoid addressing the merits of the Motion, DP&L further argues in its Memo Contra that because it was previously granted a waiver of the rule, over IEU-Ohio's objections, IEU-Ohio is estopped from arguing against the waiver DP&L seeks in this case. DP&L's argument is without merit.

As the Supreme Court found in *Office of the Ohio Consumers' Counsel v. The Public Utilities Commission of Ohio*, 111 Ohio St.3d 300, 856 N.E.2d 213, 2006-Ohio-5789 at ¶ 75, parties are not estopped in future cases from addressing new requests for waivers of the same requirement. The appeal arose because the Commission rejected an argument by OCC that the Cincinnati Gas & Electric Company ("CG&E") was estopped from seeking an extension of a waiver. In the first of two related cases, CG&E was granted a temporary waiver of the requirement in R.C. 4928.17 to separate the ownership of its generation assets from its distribution and transmission assets, and was ordered to divest its assets by the end of 2004.²² In the second case, CG&E sought a new waiver

²² *Consumers' Counsel*, 2006-Ohio-5789 at ¶ 75.

of the separation requirement and deadline to divest its generation assets, requesting that it be allowed to delay separation through 2008. The Commission granted the waiver and OCC appealed, arguing that CG&E was estopped from seeking another waiver. The Court disagreed, holding:

The doctrine [of collateral estoppel] is inapplicable here because there was no relitigation in this matter of a point of law or fact that was passed upon by the commission in the [prior] case. The corporate separation issue addressed in [the prior] case was whether CG & E could delay transferring its generating assets from December 31, 2000, to the end of 2004. The issue in this matter – whether CG & E should be allowed to amend its corporate separation plan to allow it to retain generating assets through 2008 – was not decided in the electric-transition-plan case.²³

Just as in that case, IEU-Ohio is not relitigating any matter that was previously decided. In its prior ESP case, DP&L obtained a temporary waiver of Rule 4901:1-36-04(B), O.A.C., which expires at the end of its current ESP. In the prior case, DP&L did not seek or obtain a waiver of the rule through the end of its proposed ESP in this case. Thus, the issue of whether DP&L should be granted a waiver of Rule 4901:1-36-04(B), O.A.C., for the duration of its proposed ESP in this case has not yet been litigated. Accordingly, IEU-Ohio is not estopped by the Commission's prior decision from challenging the current request for a waiver of the requirements applicable to the current Application.

Furthermore, it is well established that the Commission is permitted to change its course provided that its change is prospective, lawful, and reasonable.²⁴ Implicit in this

²³ *Id.*

²⁴ *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, 1065, ¶ 17 ("if the commission does see fit to depart from a prior order, the commission 'must explain why,' and 'the new course also must be substantively reasonable and lawful.'"); *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52.

well-established principle that is often cited by the Court and the Commission is the fact that parties can urge the Commission to change its course. Thus, even if the matter had been decided, and it has not, IEU-Ohio is not collaterally estopped from again opposing the waiver DP&L seeks.

D. DP&L must comply with the rule even if it is “impractical” unless the Commission lawfully grants a waiver. Furthermore, the reasons DP&L identifies are unrelated to the prospective waiver it seeks in this case

Finally, having been granted a three-year temporary waiver of the requirement, DP&L acts as if the Commission must continue granting it temporary waivers because compliance is now “impractical.” DP&L asserts that returning to what the law requires, a bypassable transmission rider, is impractical because it already worked with competitive retail electric service (“CRES”) providers to ensure that the correct transmission charges/credits would be transferred to DP&L, that multiple standard service offer (“SSO”) auctions were held for its current SSO, that CRES providers would have to be notified of the change from a nonbypassable to a bypassable rider, and that billing system changes may be needed.²⁵ Taken together, this list of “problems” do not provide DP&L a lawful excuse and are specious.

Initially, DP&L is not relieved from complying with Ohio and federal law because compliance is impractical. DP&L is required to comply with the “regulatory rubric” governing public utilities.²⁶ This regulatory rubric compels DP&L to establish a bypassable transmission rider, unless it can demonstrate that the waiver is otherwise

²⁵ DP&L Memo Contra at 4-5.

²⁶ *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 399, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 17-18 (2007) (“R.C. 4905.61 ... like other sections in the statutes that constitute R.C. Title 49, [] compels public utilities to comply with the regulatory rubric through the imposition of penalties or forfeitures,” and “thus furthers the legislature’s goal of ensuring compliance with the statutes governing public utilities and with commission orders.”); R.C. 4928.16.

lawful.²⁷ As discussed above, DP&L has failed to address the unlawfulness of its proposed transmission tariff sheets and instead seeks Commission inaction.

Moreover, the claim that compliance is “impractical” is specious. The items DP&L points to as impractical relate to revoking the current waiver of Rule 4901:1-36-04(B), O.A.C., for the duration of its current ESP and do not relate to prospective issues that may impact its next ESP. Denying the waiver in this case will not affect any SSO auctions that have already been held. Denying the waiver in this case will not affect the current transfer of charges/credits from CRES providers to DP&L, and it will obviate the need to worry about that transfer going forward. And, if the Commission denies the waiver, CRES providers will be provided the same amount of notice that the transmission rider is returning to a bypassable rider as they were provided when the rider became nonbypassable. Thus, DP&L’s claims are wholly meaningless.

Compliance with the law is not excused simply because it may be difficult or “impractical,” and in any event DP&L has not demonstrated that compliance is impractical. Because DP&L did not and cannot show good cause for the waiver or that the waiver would not violate any legal requirement, the Commission must deny the waiver.

II. CONCLUSION

Rule 4901:1-36-04(B), O.A.C., requires transmission riders to be bypassable. Requirements imposed by Chapter 4901:1-36, O.A.C., may only be waived if the requirement is not otherwise required by statute and upon good cause shown. DP&L did not and cannot demonstrate good cause for the waiver. More importantly, however, the

²⁷ Rule 4901:1-36-04(B), O.A.C.

Commission is required by statute to authorize a transmission rider in a manner that is not preempted by federal law, and as explained above that requires the implementation of a bypassable transmission rider. Accordingly, the Commission must deny the waiver of Rule 4901:1-36-04(B), O.A.C., sought by DP&L.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply of Industrial Energy Users-Ohio to The Dayton Power and Light Company's Memorandum in Opposition* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 4th day of April 2016, via electronic transmission.

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Summary: Motion Reply of Industrial Energy Users-Ohio to The Dayton Power and Light Company's Memorandum in Opposition electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio