

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

**REPLY IN SUPPORT OF JOINT MOTION TO STRIKE THE DAYTON POWER &
LIGHT COMPANY’S NOTICE OF WITHDRAW OF APPLICATION.**

As the City of Dayton (“Dayton”) and Ohio Partners for Affordable Energy (“OPAE”) (collectively “Joint Movants”) previously showed, the Amended Stipulation and Recommendation (“Amended Stipulation”) requires good faith negotiations before a Utility Notice can be filed. Dayton Power & Light Company (“DP&L”) failed to conduct any negotiations whatsoever, and accordingly should be directed to conduct good faith negotiations with all Signatory Parties. Those negotiations are in the best interests of all parties, including DP&L, as they could potentially limit the areas of dispute and the issues the Commission must resolve.

Rather than simply conducting the requisite good faith negotiations, DP&L claims that withdrawing its ESP Application is somehow different than a Utility Notice. DP&L argues the Utility Notice relates to withdrawing from the Amended Stipulation rather than withdrawing the ESP Application. Based on that interpretation DP&L asserts that it is not required to negotiate at all before withdrawing the ESP Application since it did not waive its statutory right to do so.

DP&L's argument fails because it does not give effect to all words in this paragraph. DP&L is a Signatory Party and so it had the choice of filing either a Notice of Withdraw (which Joint Movants contents means terminating the Stipulation) or a Utility Notice (which Joint Movants contents means terminating the case as a whole).¹ As DP&L had two options, both must have different meanings. If DP&L were correct and a Utility Notice related only to the withdraw from the Stipulation, as opposed to the case as a whole, there would have been no need separately define the Notice of Withdraw from the Utility Notice. DP&L could simply have filed a Notice of Withdraw and terminated the Stipulation while the ESP Application continued. The only possible reason to separately create and define a Utility Notice right is to address the possibility that DP&L may seek to withdraw its ESP Application after the stipulation was materially modified.

The language chosen by the parties to define these different rights is also instructive. "Notice of Withdraw" obviously applies to withdraw from a Stipulation. DP&L gave itself that right as a Signatory Party. On the other hand, Utility Notice does not reference the Stipulation in

¹ 5. This Stipulation is conditioned upon adoption of the Stipulation by the Commission in its entirety and without material modification. If the Commission rejects or modifies all or any part of this Stipulation, any Signatory Party shall have the right to apply for rehearing. If the Commission does not adopt the Stipulation without material modification upon rehearing, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, then within thirty (30) days of the Commission's Entry on Rehearing or Order on Remand: (a) any Signatory Party may withdraw from the Stipulation by filing a notice with the Commission ("Notice of Withdrawal"); or (b) DP&L may terminate and withdraw from the Stipulation by filing a notice ("Utility Notice"). Upon the filing of such Utility Notice by DP&L, the Stipulation shall immediately become null and void. No Signatory Party shall file a Notice of Withdrawal or Utility Notice without first negotiating in good faith with the other Signatory Parties to achieve an outcome that substantially satisfies the intent of the Stipulation. If a new agreement achieves such an outcome, the Signatory Parties will file the new agreement for Commission review and approval. If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are unsuccessful, and a Signatory Party files a Notice of Withdrawal, then the Commission will convene an evidentiary hearing to afford that Signatory Party the opportunity to contest the Stipulation by presenting evidence through witnesses, to cross-examine witnesses, to present rebuttal testimony, and to brief all issues that the Commission shall decide based upon the record and briefs. If the discussions to achieve an outcome that substantially satisfies the intent of the Stipulation are successful, then some or all of the Signatory Parties shall submit the amended Stipulation to the Commission for approval after a hearing if necessary.

any way and addresses the unique rights utilities have under R.C. 4928.143 which are independent of any stipulation. DP&L's attempt to claim Utility Notice is somehow the same as a Notice of Withdraw simply does not make sense when examined in the context of the language chosen by the parties.

The better interpretation of this language is the simpler one. One which gives effect to all words in the Stipulation, including DP&L's ability to file a Notice of Withdraw. The only reason the parties agreed to the separate definition of Utility Notice was in acknowledgement of DP&L's statutory ability to terminate the ESP. The Commission should give effect to that choice and strike DP&L's Notice of Withdraw until good faith negotiations have taken place.

As explained in the Joint Movants Motion to Strike, DP&L would not be prejudiced by being held to its agreement. DP&L already enforced this very provision against IGS Energy, and it is only equitable that this paragraph be enforced when applied in the other direction.²

Finally, DP&L has not contested Joint Movants legal authority showing that DP&L has the ability to waive the statutory right to withdraw under R.C. 4928.143(C)(2)(a). Instead, DP&L has made the contractual argument that it did not waive the right since Utility Notice does not refer to withdrawing from an ESP. Therefore there is no dispute that DP&L can waive its statutory right to withdraw. The only relevant question is did DP&L do so here? If so then the Commission can order DP&L to conduct good faith negotiations before withdrawing.

The Signatory Parties specifically negotiated for a negotiation process before a Notice of Withdraw or Utility Notice could be filed. That negotiation process could be beneficial for all

² See DP&L Motion to Strike Notice of Withdrawal From The Amended Stipulation filed October 26, 2018.

concerned because it will allow the parties to examine whether there are any potential areas of agreement which would limit the disputes regarding DP&L's proposed new tariffs. Joint Movants respectfully request that DP&L's purported Notice be stricken until those negotiations are complete.

Date: December 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 16th day of December, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
One of the Attorneys for the City of Dayton

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Case No(s). 16-0395-EL-SSO, 16-0396-EL-ATA, 16-0397-EL-AAM

Summary: Reply in Support of Joint Motion to Strike the Dayton Power & Light Company's Notice of Withdraw of Application electronically filed by Mr. Trevor Alexander on behalf of City of Dayton