**Before**

**The Public Utilities Commission of Ohio**

In the Matter of the Application of )

The Dayton Power and Light Company ) Case No. 13-2420-EL-UNC

For Authority to Transfer or Sell its )

Generation Assets. )

**Comments of Industrial Energy Users-Ohio**

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

**March 25, 2014 Attorneys for Industrial Energy Users-Ohio**

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1. INTRODUCTION

 The Opinion and Order (“ESP Order”) modifying and approving Dayton Power and Light Company’s (“DP&L”) electric security plan (“ESP”) required DP&L to file an application to transfer its generation assets.[[1]](#footnote-1) After filing a placeholder application, which provided scant details, DP&L filed a supplemental application (“Application”) to transfer its generation assets on February 25, 2014.

 The Application still does not provide information required by the Public Utilities Commission of Ohio (“Commission”) rules that is necessary to determine that the requested transfer satisfies statutory and administrative requirements. As discussed below, it fails to provide information regarding the terms and conditions of a transfer and information regarding the effect of the transfer on the standard service offer (“SSO”).

 Even though it cannot describe the terms of the proposed transfer to meet the minimum requirements of the Commission’s rules, DP&L also seeks to secure additional authority to shift economic and environmental risks associated with its generation assets to customers. Specifically, DP&L requests:

* authority to collect the Service Stability Rider (“SSR”) even if DP&L transfers its assets to a third party;
* authority to retain responsibility for future environmental liabilities associated with DP&L’s divested generation assets, as well as authority to “defer costs associated with environmental clean-up or remediation incurred by DP&L because of its ownership or operation of electric generation assets, and imposed in the future pursuant to federal or state law, rules, or regulations”;
* authority to retain the purchased power contract with the Ohio Valley Electric Corporation (“OVEC”) and to “defer the costs associated with OVEC, which are not currently being recovered through DP&L’s fuel rider” and to recover these expenses from all customers; and
* authority to modify its capital ratio “to maintain the greater of, (i) total debt of up to $750 million or (ii) total debt equal to 75% of ratebase at the time of separation,” which would residually encumber DP&L, the electric distribution utility (“EDU”), with generation-related debt.

Additionally, DP&L requests that the Commission waive a hearing, thereby depriving parties of the due process rights provided by the Commission’s rules.[[2]](#footnote-2)

 DP&L’s failure to provide the information required by the Commission rules and its unlawful and unreasonable requests to saddle customers with the economic risks and environmental clean-up costs of the assets it intends to transfer while also violating the terms of the order permitting its merger with the AES Corporation (“AES”) render the Application unjust, unreasonable, and not in the public interest. Pursuant to the Commission’s rules, the Commission shall set an application for the transfer of generation assets for hearing if the application appears to be unjust, unreasonable, or not in the public interest, and “[t]he commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.”[[3]](#footnote-3) Rather than scheduling a hearing, however, the Commission should summarily reject the unlawful and unreasonable proposals contained in the Application and order DP&L to file an amended application for the transfer of the generation assets that complies with the Commission’s rules, Ohio law, and sound public policy.

1. ARGUMENT

 An EDU must receive Commission approval to transfer its generation assets.[[4]](#footnote-4) The Commission may approve an application to transfer generation assets only if it “is satisfied that the sale or transfer is just, reasonable, and in the public interest . . . .”[[5]](#footnote-5) The Commission must also ensure that the transfer furthers state policy objectives contained in R.C. 4928.02.[[6]](#footnote-6)

Pursuant to Rule 4901:1-37-09(C), OAC, an application to sell or transfer generation assets shall, at a minimum:

(1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.

(2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.

(3) Demonstrate how the proposed sale or transfer will affect the public interest.

(4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.[[7]](#footnote-7)

The detailed information required by this rule enables the Commission to evaluate whether the transfer will promote competition, state policy, and the public interest. A party may receive a waiver of the application requirements only after demonstrating good cause.[[8]](#footnote-8)

* 1. DP&L has not clearly set forth the terms and conditions of the transfer

The application must “[c]learly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.”[[9]](#footnote-9) Several aspects of DP&L’s Application fall short of satisfying this requirement.

As in the prior filing, DP&L does not provide any detail regarding the terms of the transfer. It does not identify the transferee of the assets, stating it will transfer its generation assets to its unregulated affiliate or “to an unaffiliated third party through a potential sale.”[[10]](#footnote-10) It does not state the date of transfer, only offering that “a sale to a third party could occur as early as 2014.”[[11]](#footnote-11) It fails to state the amount of the purchase price, offering only that the price will be at fair market value and that it will state the fair market value “no later than 75 days before the transfer date.”[[12]](#footnote-12)

DP&L’s Application also proposes that, after the transfer of its generation assets, it be permitted to maintain temporarily total long-term debt of $750 million or total debt equal to 75% of rate base, whichever is greater. DP&L’s request appears to raise the threshold question of whether the debt associated with the to-be-transferred generation assets will remain for DP&L’s customers to service. If so, DP&L fails to disclose the amount of debt it would leave behind in the transfer.

DP&L’s Application further proposes to retain environmental liabilities associated with the historical operation of its generation assets and to seek to recover clean-up costs related to these liabilities from all customers. DP&L fails to identify any legal authority on which the Commission may approve its request or the magnitude of these liabilities or the generation assets to which the liabilities relate. Moreover, DP&L fails to identify how and when it will seek to recover the cost of these liabilities from customers.

Moreover, DP&L requests authority “to defer the costs associated with OVEC which are not currently being recovered through DP&L’s fuel rider.”[[13]](#footnote-13) As with the environmental clean-up costs it seeks to have customers pay, DP&L does not provide any legal basis that would permit the Commission to order this recovery or details regarding the magnitude of costs that it will not recover through the fuel rider.[[14]](#footnote-14) DP&L also fails to identify whether it would apply off-system sales margins from OVEC against the costs it is requesting authority to defer for future collection. DP&L is essentially asking for a blank check.

In summary, the Application does not clearly set forth the terms and conditions of the transfer as required by the Commission’s rules.

* 1. DP&L has not demonstrated how the transfer will impact the standard service offer and ignores significant adverse consequences of its Application

The Application must “[d]emonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code”[[15]](#footnote-15) and “how the proposed sale or transfer will affect the public interest.”[[16]](#footnote-16) DP&L claims that the transfer will not have a material effect on the terms of the SSO because it will provide an SSO through a competitive bidding process after it transfers the assets.[[17]](#footnote-17) DP&L also claims that “[t]he Commission found in DP&L’s ESP case that DP&L separating its generation assets was a benefit of DP&L’s ESP and was in the public interest.”[[18]](#footnote-18) Both of DP&L’s claims are incorrect.

Although DP&L states that the transfer will not affect SSO customers, it has proposed to continue existing nonbypassable charges and to lay the accounting foundation for future nonbypassable charges, which will affect SSO customers and shopping customers. DP&L, however, has not indicated the manner in which these charges will affect the existing and future SSO. Moreover, DP&L has not revealed the impact of the proposed modification to its capital ratio, discussed below, and whether that modification may be the impetus for additional future financial support in the form of yet another request for a nonbypassable charge. Without a quantification of the magnitude of those charges, DP&L cannot demonstrate the impact of its Application on the SSO.

Additionally, the Commission never determined that DP&L’s generation asset transfer is in the public interest—nor could it have made such a finding without reviewing the specific terms and conditions upon which DP&L proposed to transfer its generation assets. As discussed further below, because the terms and conditions proposed by DP&L are unlawful and unreasonable, DP&L’s Application is not just, reasonable, and in the public interest.

* 1. DP&L’s Application proposes terms and conditions that are unlawful, unreasonable, and not in the public interest
		1. If permitted to continue, the SSR should terminate after the generation assets are transferred

The Application states that DP&L will transfer its generation assets to an affiliate at fair market value on or before May 31, 2017. The Application further claims that DP&L has “recently begun to evaluate the transfer of DP&L’s generation assets to an unaffiliated third party through a potential sale. A sale to a third party could occur as early as 2014.”[[19]](#footnote-19) The Application further states that “[r]egardless of the specific timing or mechanics of divestiture, the underlying legal basis supporting the Commission’s Order in DP&L’s ESP case (12-426-EL-SSO) outlining the need for DP&L’s Service Stability Rider during the entire term of the ESP remains unchanged.”[[20]](#footnote-20) DP&L argues that because it is not a structurally separated utility, the losses of each company (distribution, transmission, or generation) may adversely affect the entire utility. DP&L further claims that “[g]iven current poor market conditions, DP&L could sustain a serious, continuing financial loss that strongly supports the ongoing need to recover the SSR throughout the term of the ESP.”[[21]](#footnote-21) As discussed below, the Commission should reject DP&L’s request to continue the SSR after it transfers its generation assets.

Initially, as discussed in more detail in Industrial Energy Users-Ohio’s (“IEU-Ohio”) Application for Rehearing in the ESP Case, the SSR is unlawful and unreasonable.[[22]](#footnote-22) Moreover, after DP&L transfers its generation assets, even under the Commission’s reasoning in the ESP Order, the Commission should direct DP&L to terminate the SSR. The Commission authorized the SSR to staunch an alleged revenue shortfall and to prop up DP&L’s total company earnings. In recognition of the connection between the SSR and the transfer of the generation assets, the Commission limited its authorization of the SSR to a five-year term so that DP&L could unwind its first mortgage bonds and transfer its generation assets in 2017.[[23]](#footnote-23) After DP&L transfers its generation assets, there simply is no reason to continue the SSR. DP&L, the EDU, will no longer be impacted by the performance of DP&L’s generation assets, and, despite DP&L’s previous claims to the contrary, DP&L can transfer its assets prior to 2017. Thus, the Commission should reject DP&L’s attempt to extend the SSR after it transfers the generation assets to a third party.

Because the SSR is unlawful, the Commission should have denied DP&L’s request to authorize the rider. After the generation assets are transferred, the rationale for continuing the rider will no longer exist. Therefore, the Commission should reject DP&L’s request for authorization to continue the SSR after it transfers the generation assets.

* + 1. DP&L’s requests to retain environmental liabilities and for accounting modifications to defer related clean-up costs is unlawful and unreasonable

DP&L also seeks authorization (1) to retain responsibility for future environmental clean-up costs associated with its “historic ownership of its generation facilities” and “to allow it to seek recovery for prudently incurred environmental clean-up costs for real property that had been used and useful for the production of electricity for the benefit of the customers of DP&L” and (2) for accounting modifications to permit it to defer the clean-up costs with interest at its cost of debt.[[24]](#footnote-24) Because there is not a lawful basis for either request and neither request is reasonable, the Commission should reject this part of the Application because it is unjust, unreasonable, and not in the public interest.

* + - 1. Authority to seek to recover environmental clean-up costs from customers

As noted above, the nature and scope of the liabilities that DP&L seeks to have customers pay at some time in the future is not disclosed. Even if DP&L had provided that information, it would not form a basis for the Commission to authorize DP&L to seek to recover environmental clean-up costs. Ohio law provides only three methods of establishing customer charges, and none permits the Commission to authorize the recovery of clean-up costs that DP&L is seeking.

The first means of establishing a charge or price is through a Market Rate Offer (“MRO”) under R.C. 4928.142. R.C. 4928.142, however, limits the price that may be authorized under an MRO to that resulting from the auction process. The environmental clean-up costs of DP&L are not related to the price of electricity produced by the auction process and could not be recovered under the limited terms of an MRO.

The second process is through the cost recovery mechanisms that can be included in an ESP under R.C. 4928.143. The costs that shall be recovered in an ESP are limited to the supply of electric generation service. Plainly, the environmental costs associated with plant held by a third party would not be a cost of the generation supplied to customers. An ESP also may include recovery of other costs, but none of the permitted additional provisions extends authority for the Commission to authorize recovery of future unknown environmental clean-up costs.[[25]](#footnote-25) Because of the statutory limits contained in R.C. 4928.143, therefore, the Commission could not authorize the recovery of these prospective unknown environmental clean-up costs.

The third possibility for the recovery of these costs would be through a base distribution rate case under R.C. Chapter 4909. R.C. 4909.15(A)(4), however, limits the expenses that an EDU may recover through its base distribution rates to “[t]he cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section” with some adjustments. The environmental clean-up costs would be those associated with assets no longer held by the EDU or used in the rendering of service during the test period. Because these are not costs of the EDU to provide service to customers, the costs would not be recoverable from customers.[[26]](#footnote-26)

Thus, the “relief” that DP&L is seeking, the authorization to file an application to recover environmental clean-up costs at some unknown future time, is meaningless. The Commission lacks authority to permit DP&L to recover these costs currently; thus, there is no legal basis for the Commission to authorize DP&L to seek recovery in the future. Certainly, DP&L can file any frivolous application it chooses, but the Commission should not encourage that behavior by granting authorization to do so.

Moreover, the Commission has implicitly found that it is reasonable to relieve customers of the environmental liabilities when a generation asset is transferred to an affiliate. In the Ohio Power Company (“AEP-Ohio”) generation asset transfer case, the Commission noted that “AEPGenCo would receive [AEP-Ohio’s] existing generation units and contractual entitlements and assume all liabilities associated with the transferred generation assets, including retired plants and the associated liabilities.”[[27]](#footnote-27) The Commission did not have to make an explicit finding as to AEP-Ohio’s request because on its face the transfer of all liabilities to the new owner is patently reasonable.

On a related issue, however, the Commission rejected AEP-Ohio’s attempt to saddle customers with liability for pollution control revenue bonds (“PCRBs”) that AEP-Ohio indicated would be difficult to transfer to the new owner. With regard to the PCRBs, AEP-Ohio sought authority to retain the bonds, thus exposing customers to the costs of those bonds. The Commission granted approval of the request to transfer the generation assets “contingent upon a filing with the Commission demonstrating that AEP-Ohio ratepayers have not and will not incur any costs associated with the cost of servicing the associated debt.”[[28]](#footnote-28) While it did not order the EDU to transfer the bonds to the affiliate, the Commission required AEP-Ohio to hold ratepayers harmless for the costs of the pollution control revenue bonds.[[29]](#footnote-29) Later, the Commission reaffirmed that AEP-Ohio’s ratepayers would not be responsible for costs of defeasance of the pollution control revenue bonds when it approved AEP-Ohio’s corporate separation plan.[[30]](#footnote-30) As these opinions demonstrate, it is just and reasonable that the environmental costs associated with generation assets that are transferred should not be the responsibility of future ratepayers.

* + - 1. Accounting authority

The Commission should also reject DP&L’s request for accounting authority to defer the anticipated environmental clean-up costs with interest at its cost of debt because the modification DP&L seeks is unlawful and unreasonable.

DP&L has asked the Commission to invoke its authority under R.C. 4905.13 to permit accounting modifications. DP&L’s request, however, assumes that the Commission may authorize accounting changes permitting DP&L to defer environmental clean-up costs associated with generation assets. The Commission’s authority to authorize accounting modifications related to generation-related assets, however, is limited. Pursuant to R.C. 4928.03, retail electric generation service is declared a competitive retail electric service. Because retail electric generation service is declared competitive, the Commission does not have authority to regulate that service except as provided by R.C. 4928.05. Under R.C. 4928.05, a competitive retail electric service supplied by an EDU is not subject to the Commission’s accounting supervision under R.C. 4905.13. R.C. 4928.05 does recognize that the Commission may exercise authority over an EDU’s competitive retail generation service as provided by R.C. Chapter 4928, but R.C. 4928.144 limits the Commission’s authority over the EDU’s accounting of deferrals to a phase-in of a rate or price established as a provision of an SSO under R.C. 4928.141 to R.C. 4928.143.

The Commission’s limited authority does not provide a basis for the Commission to approve the accounting relief sought by DP&L for two reasons. First, this Application is not seeking authority to phase-in a rate or price established as a provision of an SSO. Second, even if this proceeding were somehow related to a rate or price of an SSO (and it clearly is not), the cost recovery that DP&L seeks could not be approved as a term of an MRO or ESP. As demonstrated above, the costs that DP&L is seeking to defer could not be recovered in prices, rates, or charges that may be authorized under either R.C 4928.142 or R.C. 4928.143. Because the Application seeks authorization of accounting modifications outside the authority of the Commission, it cannot lawfully authorize the requested relief.

Further, the Commission should also find that the request to modify accounting authority is unreasonable for the same reason discussed above regarding the retention of responsibility for environmental clean-up costs. As DP&L makes clear, the accounting modifications it is seeking are the first step of a process by which DP&L will seek to recover environmental clean-up costs from its customers. As the Commission previously determined in the AEP-Ohio cases discussed above, customers should be held harmless from all liabilities and in particular costs of pollution control revenue bonds related to generation assets that will be transferred to the unregulated competitive affiliate. As in the AEP-Ohio cases, the Commission should shut the door on DP&L’s claim that customers should pay for environmental clean-up costs that DP&L may incur later. There is no reason to allow DP&L to cross that threshold by approving accounting modifications when it is unreasonable for future customers to incur the costs associated with generation assets that will be transferred to either an unregulated affiliate or an independent third party.

In summary, the Commission should reject both of DP&L’s requests regarding environmental clean-up costs. There is no lawful or reasonable basis for the Commission to authorize DP&L to seek recovery of these costs since they could not be recovered in either a lawful SSO or a distribution rate, and the Commission has already determined that customers should be held-harmless even when the EDU has retained “ownership” of the indebtedness associated with transferred generation assets. Further, the Commission lacks the authority to authorize the accounting modifications that DP&L is seeking, and the requested modifications would be unreasonable.

* + 1. DP&L’s request to defer OVEC costs is unlawful and unreasonable

Relying on AEP-Ohio‘s representation that it could not secure approval from other OVEC members to transfer its interest in its entitlement to OVEC generation on favorable terms, DP&L claims it has no expectation that the other OVEC members will consent to DP&L’s transfer of its interest in OVEC to an affiliate or third party. Thus, DP&L requests that it be permitted to retain its interest in OVEC. DP&L further requests “accounting authority pursuant to Ohio Rev. Code 4905.13, to permit DP&L to defer the costs associated with OVEC, which are not currently being recovered through DP&L’s fuel rider.”[[31]](#footnote-31) DP&L proposes to accrue carrying costs on these expenses and to collect them from all customers at a date to be determined in another Commission proceeding.[[32]](#footnote-32) DP&L’s request is unlawful and unreasonable for several reasons.

Initially, DP&L does not provide details regarding the magnitude of costs that it is seeking to defer for future collection. DP&L also fails to identify whether it would apply OVEC off-system sales margins against the costs it is requesting authority to defer. DP&L has failed to comply with the disclosure requirements of Commission rules, as noted above.

Additionally, it would be unlawful to authorize DP&L to defer and collect generation-related costs through a nonbypassble charge. R.C. 4928.02(H) prohibits anticompetitive subsidies. As the Court has stated, “each service component [is] required to stand on its own.”[[33]](#footnote-33)Based on R.C. 4928.02(H), the Commission has rejected requests for charges that would cross-subsidize an EDU’s generation business segment because the charge would be anticompetitive. In response to AEP-Ohio’s request for authority to recover closure costs (including environmental clean-up costs) for Unit 5 of the Sporn Generating Station, the Commission held that AEP-Ohio was not entitled to a nonbypassable rider because such a rider would subsidize AEP-Ohio’s generation business in violation of R.C. 4928.02(H).[[34]](#footnote-34) Likewise, in Duke’s MRO case, the Commission rejected a nonbypassable “circuit breaker” provision in reliance on R.C. 4928.02(H).[[35]](#footnote-35) Consistent with these decisions, the Commission should reject DP&L’s proposal to defer the shortfall in generation-related revenue for later recovery through a nonbypassable charge.

Moreover, as stated above, R.C. 4905.13 does not provide the Commission with authority to authorize DP&L to make accounting modifications to defer expenses related to competitive services such as generation.

Even if the Commission has authority to authorize DP&L to adopt such accounting modifications (which it does not), the Commission should not exercise that authority because DP&L has failed to demonstrate that it cannot transfer its ownership interest in OVEC. First, DP&L implies it has not attempted to transfer its ownership interest in OVEC; thus, it asks the Commission to assume something that may not be true, i.e., that other OVEC members will not agree with DP&L’s request to transfer its interest to a third party. Second, a review of the terms of the Amended and Restated Intercompany Power Agreement (“ICPA”) demonstrates that DP&L could transfer its interest to its affiliate, Dayton Power and Light Energy Resources (“DPLER”), or a third party.

The ICPA, a Federal Energy Regulatory Commission (“FERC”) approved contract, states that a sponsoring company may assign its ownership interest to a Permitted Assignee upon thirty-days’ notice:

[A]ny Sponsoring Company shall be permitted to, upon thirty (30) days notice to the Corporation and each other Sponsoring Company, without any further action by the Corporation or the other Sponsoring Companies, ***assign all or part of its rights, title and interests in, and obligations under this Agreement to a Permitted Assignee***, provided that, the assignee and assignor of the rights, title and interests in, and obligations under, this Agreement have executed an assignment agreement in form and substance acceptable to the Corporation in its reasonable discretion (including, without limitation; the agreement by the Sponsoring Company assigning such rights, title and interests in, and obligations under, this Agreement to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment).[[36]](#footnote-36)

The ICPA defines a Permitted Assignee as either an affiliate with a credit rating of BBB (Standard & Poor’s) or Baa3 (Moody’s) or an affiliate with a lesser credit rating that agrees in writing to satisfy all of the obligations to OVEC.[[37]](#footnote-37)

Additionally, the ICPA permits DP&L to transfer its ownership interest to a third party upon notice to the sponsoring companies, which triggers a thirty-day right of first refusal.[[38]](#footnote-38)

 Despite the fact that the ICPA provides DP&L with the means to transfer its interest in OVEC, DP&L has proposed that its customers bear the cost of its refusal to act. The Commission should not indulge DP&L’s request for customers to bear additional unlawful nonbypassable charges—especially when they are related to costs that could be avoided through prudent action.

* + 1. DP&L is seeking to retain debt that may expose customers to unreasonable leverage

 DP&L requests that it be permitted to temporarily maintain total long-term debt of $750 million or total debt equal to 75% of rate base, whichever is greater, after the transfer of its generation assets.  The Application further indicates that it is likely that DP&L’s equity ratio will fall below the 50% level in the course of the debt restructuring necessary to achieve separation in order to effectuate full legal separation of its generation assets. [[39]](#footnote-39)  Therefore, DP&L requests temporary relief from its commitment in the Stipulation in Case No. 11-3002-EL-UNC to maintain an equity ratio of at least 50%.[[40]](#footnote-40) It also requests that it be permitted to maintain the resulting debt level and implied capital structure through “at least 2018,” after which further debt reductions will be conditioned on market recovery and an ability to reallocate debt to its non-regulated affiliate.[[41]](#footnote-41) Not only is DP&L requesting relief from the Stipulation, it wants that relief to be indefinite in duration.

It is unlawful to permit DP&L to transfer its generation assets while leaving DP&L responsible for servicing the associated debt because it would provide an unlawful subsidy to DP&L’s unregulated affiliate or a third party. That subsidy is prohibited, as discussed above.

Further, the result is plainly unreasonable. The Commission already has rejected a similar AEP-Ohio request to saddle the EDU with generation-related debt without recourse to its affiliate. As discussed previously, AEP-Ohio was required to hold customers harmless from pollution control revenue bonds that it stated it could not transfer until after corporate separation.[[42]](#footnote-42) Because it is unreasonable to saddle DP&L’s customers with debt related to assets held by a third party, the Commission should also reject DP&L’s proposal to leave the debt with the EDU.

Moreover, DP&L’s request to obtain relief from its previous commitment that it maintain a capital structure that includes an equity ratio of at least 50% is not appropriate because it violates the Stipulation and could potentially endanger the investment grade credit rating that DP&L committed to maintain.[[43]](#footnote-43)  The provision of the Stipulation requiring an equity ratio of at least 50% helps to safeguard against the merger with AES potentially having a detrimental effect on DP&L’s financial condition.  By endangering DP&L’s credit rating, the proposed changes expose DP&L to increased debt costs it may try to pass on to its customers.[[44]](#footnote-44)

The approval of the merger was predicated on certain customer protections regarding the retention of a reasonable equity ratio. DP&L now seeks to renege on that commitment. The Commission should not authorize the highly leveraged position that could result from DP&L’s proposal.

* + 1. The Commission should deny DP&L’s request to waive a hearing

Rule 4901:1-37-09(D), OAC, states that when the Commission receives an application seeking approval for the transfer of generation assets, “[t]he commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset” and may set a hearing if it determines that the application appears unjust, unreasonable, or not in the public interest. DP&L requests that the Commission waive the hearing requirement. It bases that request on the Commission’s decision not to conduct an evidentiary hearing when it considered recent generation asset transfers by AEP-Ohio and Duke.[[45]](#footnote-45) DP&L’s arguments that no evidentiary hearing is necessary fail on factual and legal grounds.

The Commission has evaluated waiver requests on a case-by-case basis.[[46]](#footnote-46) Thus, a determination of good cause turns upon the facts of each case. As demonstrated in these comments, DP&L’s Application is incomplete and, if approved as proposed, would likely cripple the financial health of the EDU by saddling it with legacy generation-related debt and environmental liabilities. Thus, the Commission should require an evidentiary hearing because the Application appears to be unjust, unreasonable, and not in the public interest.

Further, the Duke and AEP-Ohio decisions do not provide a ground for waiving a hearing. In the Duke case,[[47]](#footnote-47) Duke received approval of the generation asset transfer as part of a comprehensive stipulation and recommendation to resolve Duke’s proposed ESP application. That stipulation contained a number of conditions associated with approval of the generation asset transfer that are not present in DP&L’s Application. For example, one section provided:

(8) Generating Assets

(a) Duke will transfer title, at net book value, to all of its generation assets out of Duke. Such transfer shall occur on or before December 31, 2014, and Duke commits to using its best commercial efforts to complete the transfer as soon as practicable upon its acceptance of a Commission order approving the stipulation and upon receipt of necessary regulatory approvals. Staff, or an independent auditor, at the Commission's discretion and with costs thereof to be recovered through Rider SCR, shall audit the terms and conditions of the transfer of the generation assets to ensure compliance with the stipulation and shall also audit Duke's compliance with Section 4928.17, Revised Code, and Rule 4901:1-37, O.A.C., to ensure that no subsidiary or affiliate of Duke that owns competitive generation assets has any competitive advantage due to its affiliation with Duke. The parties support Duke's request for a waiver of the Commission's rule requirements, as set forth in Rule 4901:l-37-09(B) through (D), O.A.C., relating to the sale or transfer of generating assets. **Approval of the stipulation shall constitute the Commission's consent required by paragraphs (A) and (E) of that rule, and that no hearing is required under paragraphs (D) and (E) of that rule.** Staff shall be provided with access to books and records in compliance with paragraph (F) of that rule.

(b) Approval of this stipulation will serve as the Commission's approval of full legal corporate separation, as contemplated by Section 4928.17(A), Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and all of Duke's generation assets shall be transferred to an affiliate. Full legal corporate separation will be implemented as soon as reasonably possible after necessary regulatory approvals are obtained. **Following the transfer of the generation assets, Duke shall not, without prior Commission approval, provide or loan funds to, provide any parental guarantee or other security for any financing for, and/or assume any liability or responsibility for any obligation of subsidiaries or affiliates that own generating assets**; provided, however, that contractual obligations arising before the signing of the stipulation shall be permitted, but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or it is commercially infeasible for Duke to transfer such obligation to its subsidiary or affiliate, **and provided further that, on and after the signing of this stipulation, Duke shall ensure that all new contractual obligations have a successor-in-interest clause that transfers all Duke responsibilities and obligations under such contracts and relieves Duke from any performance or liability under the contracts upon the transfer of the generation assets to its subsidiaries.** This does not restrict Duke's ability to receive and pass through to the subsidiary(ies) that own the generation assets equity contributions from its parent that are in support of the generation assets, nor does it restrict Duke's ability to receive dividends from the subsidiary(ies) that own the generation assets and pass through such dividend(s) to its parent. **Generation-related costs associated with implementing corporate separation shall not be recoverable from customers.** Any subsidiary of Duke to which generation assets are transferred shall not use or rely upon the rating(s) from credit rating agency(ies) for Duke if such subsidiary currently does not maintain separate rating(s) from the credit rating agency(ies), then upon transfer of any of the generation assets, it shall either seek to establish such rating(s) or shall tie its credit rating to DEC as soon as practicable, but no later than six months following such transfer.[[48]](#footnote-48)

Thus, unlike the present case, the *Duke ESP Case* addressed not just the SSO but included (as part of a comprehensive stipulation and recommendation) the resolution of issues regarding the transfer of generation assets. The Commission approval of the asset transfer (by accepting the stipulation and recommendation) specifically constituted a finding that the public interest demonstration required by Rule 4901:1-37-09(E), O.A.C., had been met, and that no hearing was necessary.[[49]](#footnote-49) Duke also agreed (unlike DP&L’s Application in this proceeding) that any generation-related implementation costs associated with the asset transfer would not be recovered from its EDU customers.

Additionally, the stipulation and recommendation adopted by the Commission in the *Duke ESP Case* specifically provided that:

This Stipulation is submitted for purposes of these proceedings only and neither this Stipulation nor any Commission order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation.[[50]](#footnote-50)

Thus, DP&L’s reliance upon the *Duke ESP Case* to support its request for a waiver of the hearing requirement should carry no weight.

 DP&L fares no better when it relies upon *AEP-Ohio’s Corporate Separation Case* to support its request for a waiver. Although DP&L is correct that the Commission did not hold a hearing in the *AEP-Ohio Corporate Separation Case*,it did so only after finding the terms and conditions associated with Ohio Power’s generation asset divestiture had been thoroughly considered in the evidentiary hearing associated with AEP-Ohio’s second ESP.[[51]](#footnote-51) In contrast, DP&L had not even filed its Application at the time of its ESP proceeding; thus, the Application could not have been considered in the evidentiary hearing.[[52]](#footnote-52) Further, AEP-Ohio’s generation asset transfer was conditioned upon the transfer occurring at net book value,[[53]](#footnote-53) and Ohio Power agreed that with limited exceptions all generation assets and liabilities would be transferred from AEP-Ohio to its affiliate,[[54]](#footnote-54) facts and circumstances that do not exist in the present proceeding. Thus, there is nothing substantive in the *AEP-Ohio Corporate Separation Case* that supports DP&L’s waiver request. DP&L has fallen far short of good cause to grant a waiver of the hearing requirement. Its waiver request must be denied.

1. CONCLUSION

 For the reasons stated herein, IEU-Ohio urges the Commission to reject this Application and direct DP&L to file a complete application when it can provide the information required by the Commission’s rules. To the extent that the Commission does address the authorizations that DP&L has sought, it should reject DP&L’s requests for authority to extend and introduce anticompetitive generation-related nonbypassable charges, for authority to retain environmental liability for plants it will not own, and for authority to renege on the commitments it made when seeking approval of the merger with AES. Further, it should suspend the authorization of the SSR if it authorizes DP&L to transfer the assets to a third party. If the Commission does not reject DP&L’s Application outright, the Commission should set this matter for hearing as required by its rules because the Application seeks to transfer generation assets under terms that are unjust, unreasonable, and not in the public interest.

 Respectfully submitted,

 /s/ Frank P. Darr

 Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Matthew R. Pritchard

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**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 25th day of March 2014, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Frank P. Darr

 Frank P. Darr

Judi L. Sobecki

The Dayton Power & Light Company

1065 Woodman Drive

Dayton, Ohio 45432

judi.sobecki@dplinc.com

Charles J. Faruki

Jeffrey S. Sharkey

Faruki Ireland & Cox P.L.L.

500 Courthouse Plaza, S.W.

10 North Ludlow Street

Dayton, Ohio 45402

cfaruki@ficlaw.com

jsharkey@ficlaw.com

**On Behalf of The Dayton Power and Light Company**

Bruce J. Weston

Edmund Berger

Maureen R. Grady

Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

edmund.berger@occ.ohio.gov

maureen.grady@occ.ohio.gov

**On Behalf of the Office of the Ohio Consumers’ Counsel**

Kimberly W. Bojko

Mallory M. Mohler

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, Ohio 43215

Bojko@carpenterlipps.com

Mohler@carpenterlipps.com

**Oh Behalf of Ohio Manufacturers’ Association Energy Group**

Rocco D'Ascenzo

Duke Energy Ohio, Inc.

139 East Fourth Street – 1303 Main

Cincinnati, Ohio 45202

Rocco.d'ascenzo@duke-energy.com

**On Behalf of Duke Energy Ohio, Inc**

David F. Boehm

Michael L. Kurtz

Jody Kyler Cohn

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

dboehm@bkllawfirm.com

mkurtz@bkllawfirm.com

jkylercohn@bkllawfirm.com

**On Behalf of Ohio Energy Group**

Mark A. Whitt

Andrew J. Campbell

Gregory L. Williams

Whitt Sturtevant LLP

The KeyBank Building, Suite 1590

88 East Broad Street

Columbus, Ohio 43215

whit@whitt-sturtevant.com

Campbell@whitt-sturtevant.com

Williams@whitt-sturtevant.com

Vincent Parisi

Lawrence Friedeman

Matthew White

Interstate Gas Supply, Inc.

6100 Emerald Parkway

Dublin, Ohio 43016

vparisi@igsenergy.com

lfriedeman@igsenergy.com

mswhite@igsenergy.com

**On Behalf of Interstate Gas Supply, Inc.**

Mark A. Hayden

FirstEnergy Service Company

76 South Main Street

Akron, Ohio 44308

haydenm@firstenergycorp.com

James F. Lang

N. Trevor Alexander

Calfee, Halter & Griswold LLP

The Calfee Building

1405 East Sixth Street

Cleveland, Ohio 44114

jlang@calfee.com

talexander@calfee.com

**On Behalf of FirstEnergy Solutions Corp.**

Bryce A. McKenney

Attorney Examiner

Public Utilities Commission of Ohio

180 East Broad Street

Columbus, Ohio 43215

**Attorney Examiner**

1. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan,* Case No. 12-426-EL-SSO *et al*., Opinion and Order at 15-16 (Sept. 4, 2013) (“*DP&L ESP C*ase”). [↑](#footnote-ref-1)
2. Rule 4901:1-37-09(D), Ohio Administrative Code (“OAC”). [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. R.C. 4928.17(E). [↑](#footnote-ref-4)
5. Rule 4901:1-37-09(E), OAC. [↑](#footnote-ref-5)
6. Rule 4901:1-37-02, OAC. [↑](#footnote-ref-6)
7. Rule 4901:1-37-09(C), OAC. [↑](#footnote-ref-7)
8. Rule 4901:1-37-02(C), OAC. [↑](#footnote-ref-8)
9. Rule 4901:1-37-09(C)(1), OAC. [↑](#footnote-ref-9)
10. Application at 2. [↑](#footnote-ref-10)
11. *Id*. [↑](#footnote-ref-11)
12. *Id*. If the assets are transferred to a third party, the “FMV shall be the sale price of the assets.” *Id*. [↑](#footnote-ref-12)
13. *Id*. at 7. [↑](#footnote-ref-13)
14. *Id.* at 5-7. [↑](#footnote-ref-14)
15. Rule 4901:1-37-09(C)(2), OAC. [↑](#footnote-ref-15)
16. Rule 4901:1-37-09(C)(3), OAC. [↑](#footnote-ref-16)
17. Application at 7. [↑](#footnote-ref-17)
18. *Id*. at 8. [↑](#footnote-ref-18)
19. Application at 2. [↑](#footnote-ref-19)
20. *Id*. at 3. [↑](#footnote-ref-20)
21. *Id.*  [↑](#footnote-ref-21)
22. *DP&L ESP Case*, Application for Rehearing of Industrial Energy Users-Ohio at 26-57 (Oct. 4, 2013). [↑](#footnote-ref-22)
23. As DP&L’s Chief Financial Officer testified, “[t]he revenues from the ESP, including the SSR revenues, are needed to ensure the financial integrity of DP&L, and are required to meet DP&L's own obligations and enable the Company to legally separate at December 31, 2017.” *DP&L ESP Case,* Rebuttal Testimony of Craig L. Jackson at 5 (Mar. 28, 2013). [↑](#footnote-ref-23)
24. Application at 3-5. [↑](#footnote-ref-24)
25. The Commission may not include a provision in an ESP that is not authorized by R.C. 4928.143(B)(2)(b*). In re Columbus Southern Power Co*., 128 Ohio St.3d 512 (2011). [↑](#footnote-ref-25)
26. R.C. 4909.15(A)(4). *See* *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Case No. 07-551-EL-AIR, *et al.,* Opinion and Order at 14 (Jan. 21, 2009). The Commission’s recent decision affording Duke Energy Ohio, Inc. (“Duke”) recovery of some remediation costs is inapplicable to the facts presented by DP&L. To the extent that the Commission’s decision is lawful (and it has been appealed to the Supreme Court by three parties), Duke sought remediation costs for property it currently owns and it was not permitted to include carrying charges. *See In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al*., Opinion and Order at 36-46 & 59-60 (Nov. 13, 2013). In contrast, DP&L is seeking to transfer the assets and to defer future environmental clean-up costs with interest for the property it will have transferred. [↑](#footnote-ref-26)
27. *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order at 7 (Oct. 17, 2012) (hereinafter “*AEP-Ohio Corporate Separation Case*”). [↑](#footnote-ref-27)
28. *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) (hereinafter “*AEP-Ohio ESP Case*”). [↑](#footnote-ref-28)
29. *Id*. [↑](#footnote-ref-29)
30. *AEP-Ohio Corporate Separation Case*, Finding and Order at 17-18. [↑](#footnote-ref-30)
31. Application at 6-7. [↑](#footnote-ref-31)
32. *Id.* [↑](#footnote-ref-32)
33. *Migden-Ostrander v. Pub. Util. Comm’n of Ohio*, 102 Ohio St.3d 451, 453 (2004). [↑](#footnote-ref-33)
34. *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) (hereinafter “*Sporn Decision*”). [↑](#footnote-ref-34)
35. “[I]t is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in Rider SCR from shopping customers, under any circumstances, we believe that it would create an anticompetitive subsidy.” *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 63 (Feb. 23, 2011) (hereinafter “Duke MRO Order”). [↑](#footnote-ref-35)
36. ICPA at 20-21 (Sections 9.18 to 9.182). For ease of reference, excerpted pages of the ICPA are attached to these Comments as “Attachment 1.” [↑](#footnote-ref-36)
37. The ICPA at 4 (Section 1.0115) provides:

***"Permitted Assignee" means a person that is (a) a Sponsoring Company or its Affiliate whose long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, has a Standard & Poor's credit rating of at least BBB and a Moody's Investors Service, Inc. credit rating of at least Baa*3** (provided that, if the proposed assignee's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such assignee's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); or ***(b) a Sponsoring Company or its Affiliate that does not meet the criteria in subsection (a) above, if the Sponsoring Company or its Affiliate that is assigning its rights, title and interests in, and obligations under, this Agreement agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations related to the assigned rights, title and interests to the extent such obligations are not satisfied by the assignee of such rights, title and interests***; provided that, in no event shall a person be deemed a "Permitted Assignee" if counsel for the Corporation reasonably determines that the assignment of the rights, title or interests in, or obligations under, this Agreement to such person could cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer. (Emphasis added). [↑](#footnote-ref-37)
38. *See* ICPA at 21-23 (Section 9.183(a) through (e)). [↑](#footnote-ref-38)
39. Application at 7-8. [↑](#footnote-ref-39)
40. *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER, Stipulation and Recommendation at 4 (Oct. 26, 2011) (“*Merger Case*”). *Id.*, Finding and Order at 9 (Nov. 22, 2011). [↑](#footnote-ref-40)
41. Application at 8. [↑](#footnote-ref-41)
42. *AEP-Ohio ESP Case*, Opinion and Order at 59 (Aug. 8, 2012). [↑](#footnote-ref-42)
43. *Merger Case*, Finding and Order at 6 (Nov. 22, 2011). [↑](#footnote-ref-43)
44. Although this Application does not present an issue regarding the continuing operation of DP&L, the Commission has previously indicated that it will not endorse an unsustainable business model. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 25-26 (Sept. 2, 2009). [↑](#footnote-ref-44)
45. Application at 11. [↑](#footnote-ref-45)
46. *See In the Matter of the Application of Aqua Ohio, Inc. for Authority to Increase its Rates and Charges in its Lake Erie Division*, Case No. 09-1044-WW-AIR, Entry at 2 (Jan. 20, 2010) (holding that waiver requests must be evaluated on a case-by-case basis); *AEP-Ohio ESP Case*, Entry at 3 (Apr. 25, 2012) (holding that “inclusion of projected Turning Point solar project costs were an important consideration in the statutory test under Section 4928.143, Revised Code” and that it is “not only necessary for our consideration of the modified application, but is also in the public interest.”); *see also In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry at 6 (Apr. 25, 2012) (holding that the waiver request should be denied because the information is necessary for consideration of the type of application before the Commission). [↑](#footnote-ref-46)
47. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO *et al*., Opinion and Order (Nov. 22, 2011) (hereinafter “*Duke ESP Case*”). [↑](#footnote-ref-47)
48. *Duke ESP Case*,Opinion and Order at 29-31 (emphasis added). [↑](#footnote-ref-48)
49. Issues regarding the generation asset transfer were considered simultaneously during the evidentiary hearing on Duke’s proposed ESP. *Id.* at 31-32. [↑](#footnote-ref-49)
50. *Duke ESP Case*,Stipulation and Recommendation at 41-42 (Oct. 24, 2012). [↑](#footnote-ref-50)
51. *AEP-Ohio Corporate Separation Case*, Finding and Order at 11. As demonstrated by its appeal of the Commission’s failure to properly review the terms and conditions of the AEP-Ohio transfer of generation assets, IEU-Ohio, however, does not concede that the Commission lawfully relied upon the ESP hearing to waive a hearing in the *AEP-Ohio Corporate Separation Case*. [↑](#footnote-ref-51)
52. *DP&L ESP Case*, Opinion and Order at 16. “[T]he ESP term will end on December 31, 2016, and the Commission expects DP&L to file a generation divestment plan that divests all of its generation assets by that date.” [↑](#footnote-ref-52)
53. *AEP-Ohio Corporate Separation Case,* Finding and Order at 4. [↑](#footnote-ref-53)
54. *Id.* at 5, 23. [↑](#footnote-ref-54)