BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets.	))))	Case No. 13-2420-EL-UNC

FINDING AND ORDER

The Commission finds:

(1) The Dayton Power and Light Company (DP&L or the Company) is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

(2) On September 4, 2013, the Commission issued its Opinion and Order in Case No. 12-426-EL-SSO, et al., authorizing DP&L to establish it's second electric security plan (ESP), as modified by the Commission. Subsequently, on September 6, 2014, the Commission issued an Entry Nunc Pro Tunc modifying the Order. The Commission's Order directed DP&L to divest its generation assets by December 31, 2016. *In re The Dayton Power and Light Company*, Case No. 12-426-EL-SSO, et al., (*ESP II*), Opinion and Order (Sept. 4, 2013) at 16.

(3) On March 19, 2014, the Commission issued an Entry on Rehearing in *ESP II* directing DP&L to divest its generation assets by January 1, 2016. *ESP II*, Entry on Rehearing (March 19, 2014) at 31. However, on June 4, 2014, the Commission issued a subsequent Entry on Rehearing modifying the date for DP&L to divest its generation assets to January 1, 2017. *ESP II*, Entry on Rehearing (June 4, 2014) at 5.

(4) Pursuant to *ESP II*, on December 30, 2013, DP&L filed an initial application in this case for Commission approval to transfer or sell its existing generating assets. In its initial application, DP&L indicated that it would be filing a supplemental application seeking the Commission's authorization to transfer, sell, or decommission some or all

of its generation assets. Additionally, DP&L sought waivers of any requirement that the Commission conduct a hearing in this matter and of the requirement to state the fair market value of the generation assets to be transferred. DP&L's initial application also represented, to the best of DP&L's ability at the time, the purpose, terms, and conditions of the asset transfer, the effect of transfer on standard service offer (SSO) service, the public interest, and the net book value of the generating assets.

(5) On January 1, 2014, the attorney examiner issued an Entry establishing a procedural schedule in this matter with a request for comments and reply comments to DP&L's application. Comments were filed on DP&L's initial application by Staff, the Ohio Consumers' Counsel (OCC), Duke Energy Ohio, Inc. (Duke), FirstEnergy Solutions Corp. (FES), Direct Energy Services, LLC, and Direct Energy Business, LLC (collectively, Direct Energy), Duke Energy Commercial Asset Management (DECAM), Industrial Energy Users - Ohio (IEU-Ohio), and the OMA Energy Group (OMA Energy). Reply comments were filed by DP&L, OCC, FES, and Duke.

(6) On February 25, 2014, DP&L filed a supplemental application in this case seeking the Commission's authorization to transfer its generation assets to an affiliate or to sell the generation assets to a third party. DP&L's supplemental application also sought waiver of any requirement that the Commission conduct a hearing in this matter and waiver of the requirement to state the fair market value of the generation assets to be transferred. Additionally, DP&L's supplemental application stated, to the best of DP&L's ability at the time, the purpose, terms, and conditions of the asset transfer, the effect of transfer on standard service offer (SSO) service, the public interest, and the net book value of the generating assets.

(7) On March 4, 2014, the attorney examiner issued an Entry establishing a revised procedural schedule and requesting additional comments and reply comments related to DP&L's supplemental application. Comments were filed by Staff, AEP Generation Resources Inc. (AEP-Gen), Direct Energy,

Ohio Partners for Affordable Energy (OPAE), FES, IEU-Ohio, Ohio Energy Group (OEG), Duke, the Retail Energy Supply Association (RESA), OMA Energy, and OCC. Reply comments were filed by DP&L, Direct Energy, OCC, RESA.

(8) On May 23, 2014, DP&L filed an amended supplemental application. DP&L indicated in its amended supplemental application that it was still considering two distinct tracks: to transfer the generation assets to an affiliate or to sell the generation assets to a third party. DP&L's amended supplemental application provided updated purpose, terms, and conditions of the asset transfer.

(9) On May 30, 2014, the attorney examiner issued an Entry establishing a revised procedural schedule and requesting additional comments and reply comments relating to DP&L's amended supplemental application. Comments on DP&L's amended supplemental application were filed by Staff, FES, IEU-Ohio, OEG, OCC, the City of Miamisburg (Miamisburg), OMA Energy, and IEU-Ohio. Reply comments were filed by OEG, OCC, and DP&L.

(10) Additionally, on July 14, 2014, DP&L filed a notice in this case with an attached press release indicating that DP&L had decided to transfer its generation assets to an affiliate by January 1, 2017, in accordance with Track 1 of its amended supplemental application.

I. Procedural Matters

(11) On January 8, 2014, Duke, FES, Interstate Gas Supply, Inc. (IGS), OMA Energy, and OCC filed motions to intervene and memoranda in support. The Commission finds that the motions to intervene are reasonable and should be granted.

(12) On April 22, 2014, DP&L filed a motion for protective order and memorandum in support, arguing that discovery does not need to be conducted in this proceeding and that, if discovery is conducted in this proceeding, then DP&L has legitimate grounds for not responding to all of OCC's discovery requests. On May 7, 2014, OCC filed a memorandum contra in opposition to DP&L's motion for

protective order. Thereafter, on May 15, 2014, DP&L filed a reply to OCC's memorandum contra.

Similarly, on May 2, 2014, OCC filed a motion to compel responses to discovery arguing that the Commission should hold that OCC has an ample right to discovery of any matter, not privileged, which is relevant to the subject matter of this proceeding. On May 14, 2014, OCC filed a second motion to compel responses to discovery making the same arguments as in its first motion. On May 19, 2014, and on May 30, 2014, DP&L filed memoranda contra to the motions filed by OCC to compel responses to discovery. Thereafter, on May 27, 2014, and on June 5, 2014, OCC filed its replies to DP&L's memoranda contra the motions to compel responses to discovery.

(13) On May 30, 2014, the attorney examiner issued an Entry granting, in part, and denying, in part, the motion for protective order filed by DP&L. The attorney examiner held, inter alia, that until the Commission makes a determination on DP&L's request for waiver of Ohio Adm.Code 4901:1-37-09(D), DP&L should engage in discovery as if this case were proceeding to hearing. Further, the attorney examiner deferred ruling on OCC's motions to compel and directed the parties to proceed in good faith to respond to discovery requests in light of the examiner's ruling.

(14) The Commission finds that OCC's motions to compel are moot since the parties appear to have responded in good faith to discovery, pursuant to the attorney examiner's Entry.

(15) DP&L requests in its initial application that the Commission waive Ohio Adm.Code 4901:1-37-09(D) to forego holding a hearing in this matter. DP&L asserts that waiving a hearing would be consistent with the Commission's Orders in AEP's and Duke's generation asset transfer cases, in which no hearing was required. *In re Ohio Power Company*, Case No. 12-1126-EL-UNC, (*AEP Corporate Separation*), Opinion and Order (Oct. 17, 2012) at 11; *In re Duke Energy Ohio, Inc.*, Case No. 11-3549-EL-SSO, et al., (*Duke ESP*), Opinion and Order (Nov. 22, 2011) at 46. DP&L then reasserts its request for

waiver of Ohio Adm.Code 4901:1-37-09(D) in its supplemental application and in its amended supplemental application (DP&L Supp. App. at 11; DP&L Am. Supp. App. at 18).

Staff, FES, OCC, DECAM, IEU-Ohio, OEG, and OMA Energy argue that DP&L did not present sufficient information in its initial application, supplemental application, and amended supplemental application to determine whether hearing should be waived (Staff Comments at 3; Staff Supp. Comments at 7; FES Comments at 4-5; FES Supp. Comments at 8; OCC Comments at 14-15; OCC Supp. Comments at 21; DECAM Comments at 2; IEU-Ohio Comments at 8-10; IEU-Ohio Supp. Comments at 20; OEG Supp. Comments at 7-9; OMA Energy at 2; OMA Energy Supp. Comments at 6).

However, Staff subsequently argues that if the Commission authorizes the assets to be transferred at net book value and directs that all environmental liabilities transfer with the generation assets, then a hearing may not be necessary (Staff Am. Supp. Comments at 2, 5).

(16) Thereafter, on May 30, 2014, IEU-Ohio and OCC filed a joint motion for hearing and memorandum in support arguing that a hearing should be held in this matter pursuant to Ohio Adm.Code 4901:1-37-09(D). IEU-Ohio and OCC argue that even after DP&L's amended supplemental application, the proposal is unjust, unreasonable, and not in the public interest. Additionally, IEU-Ohio and OCC assert that DP&L's proposal would divest Commission jurisdiction over DP&L's generating assets. IEU-Ohio and OCC argue that each of DP&L's applications has failed to include enough information for the Commission to approve the application.

On June 16, 2014, DP&L filed a memorandum contra to the joint motion for hearing filed by IEU-Ohio and OCC. DP&L argues that it does not know the information sought by IEU-Ohio and OCC, and that the information would not become available in hearing. Additionally, DP&L indicates that a hearing would waste Commission time and resources

because DP&L agreed to transfer the generation assets to an affiliate. Further, DP&L reiterates that Commission precedent supports that where generation assets are being transferred to an affiliate at net book value, no hearing is required. *AEP Corporate Separation,* Opinion and Order (Oct. 17, 2012) at 11; *Duke ESP*, Opinion and Order (Nov. 22, 2011) at 46.

(17) The Commission finds that the joint motion for hearing filed by IEU-Ohio and OCC should be denied. We note that DP&L's current plan to transfer the generation assets to an affiliate resolves many of the concerns raised by commenters. Specifically, DP&L has indicated the transferee, indicated the net book value, agreed to transfer the assets at net book value, and has agreed to transfer the environmental liabilities with the generation assets.

Nonetheless, we find that DP&L's request for waiver of Ohio Adm.Code 4901:1-37-09(D) should be granted. We find that DP&L has satisfied the requirements of Ohio Adm.Code Chapter 4901:1-37 and that DP&L's application is not unjust, unreasonable, or not in the public interest. This process is consistent with Commission precedent when AEP and Duke divested their generation assets. We found in the *AEP Corporate Separation* case that Ohio Adm.Code 4901:1-37-09(D) provides that a hearing should be held if in the Commission's discretion an application appears to be unjust, unreasonable, or not in the public interest. *AEP Corporate Separation,* Opinion and Order (Oct. 17, 2012) at 2, 11; *Duke ESP,* Opinion and Order (Nov. 22, 2011) at 46. In this instance, we find that DP&L's application is not unjust, unreasonable, or not in the public interest. Moreover, the question of whether DP&L should divest its generation assets has already been thoroughly litigated and addressed in *ESP II.* Accordingly, we find that no hearing is necessary in this case because the application does not appear to be unjust or unreasonable, and the application is in the public interest.

(18) On July 15, 2014, OEG filed a motion for conference arguing that DP&L's representation that it plans to transfer the generation assets to an affiliate warrants a conference

amongst the parties to attempt to resolve the remaining issues in this case. On July 24, 2014, DP&L filed a memorandum contra to OEG's motion for conference arguing that extensive comments and reply comments have been filed in this case, so a conference is unnecessary.

(19) The Commission finds that OEG's motion for conference should be denied. As noted above, the question of whether DP&L should divest its generation assets was fully litigated in the *ESP II* proceeding. DP&L has filed in this docket an application, a supplemental application, and an amended supplemental application. Comments and reply comments have been filed by numerous interested parties regarding each application. Further, as discussed above, the Commission has determined that a hearing is not necessary and that an adequate record exists in this proceeding for the Commission to reach a decision on the merits of the application.

II. The Object, Purpose, Terms, and Conditions of DP&L's Application to Transfer its Generation Assets

(20) Pursuant to Ohio Adm.Code 4901:1-37-09(C)(1), an application to sell or transfer generating assets shall, at a minimum, clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.

(21) DP&L asserts that the purpose for its application to divest the generation assets is to comply with the Commission's decision in *ESP II*, in which the Commission ordered DP&L to divest its generation assets. *See ESP II*, Opinion and Order (Sept. 4, 2013) at 16, Second Entry on Rehearing (March 19, 2014) at 31. DP&L indicates that there are numerous issues regarding the transfer or sale of its generation assets, including DP&L's ownership in non-deregulated plants, DP&L's interest in the Ohio Valley Electric Corporation (OVEC), the closing of Hutchings Station, the closing of Beckjord Station, union contract renegotiation, and additional financing issues. (DP&L Initial App. at 7; DP&L Supp. App. at 3-8.)

However, DP&L makes numerous commitments while this proceeding is pending to facilitate its divestiture of the generation assets. First, DP&L commits that it will not take on any new debt with terms that would preclude it from divesting its generation assets. Next, DP&L agrees to use cash flows in excess of those necessary for the ordinary operation of business to pay down debt until the separation date. Third, DP&L avers that it will ensure that all new generation-related contracts have a successor-in-interest clause that permits DP&L to transfer all of its responsibilities and obligations under such contracts and relieves DP&L from any performance or liability under the contracts upon the divestiture of DP&L's generation assets. (DP&L Initial App. at 7; DP&L Supp. App. at 9.)

Additionally, DP&L seeks Commission approval of certain requests in association with the divestiture of its generation assets. First, DP&L requests that the Commission uphold its prior decisions to permit DP&L to collect the SSR, regardless of the generation asset divestiture. Second, DP&L asks the Commission to authorize DP&L to retain responsibility for future environmental liabilities associated with DP&L's historic ownership of its generation facilities. Third, DP&L requests that the Commission permit it to recover all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes, and related costs. Fourth, DP&L requests that the Commission permit it to retain its interest in OVEC and to retain the OVEC contractual entitlements. Further, DP&L requests that the Commission authorize it to temporarily maintain total long term debt of $750 million or total debt equal to 75 percent of rate base, whichever is greater. (DP&L Supp. App. at 3-8; DP&L Am. Supp. App. at 1-16.)

Moreover, in its amended supplemental application, DP&L notes that, if a third party purchases DP&L's generation assets, DP&L may realize an increase in its return on equity above the threshold established in *ESP II* for the significantly excessive earnings test (SEET). DP&L contends that sale of the generation assets would constitute an extraordinary event and that any financial impact should be excluded from the SEET (DP&L Am. Supp. App. at 9).

(22) The Commission finds that DP&L has satisfied the requirements of Ohio Adm.Code 4901:1-37-09(C)(1) by clearly setting forth the object, purpose, terms, and conditions of the transfer. We find that DP&L has resolved Staff's prior concerns about the inadequacy of its initial application by addressing the comments and reply comments in its subsequent applications. By providing the net book value of the assets, proposing to transfer the assets to an affiliate at net book value, and agreeing to transfer the environmental liabilities with the assets, we find that DP&L has resolved any need that we might have for additional information. Additionally, we find that the information that DP&L has already provided sufficiently demonstrates that the object, purpose, terms, and conditions of the divestiture benefits the public interest. Therefore, we find that DP&L's request to waive the requirement that it provide the fair market value of the assets is reasonable and should be granted. As discussed below, in the event that DP&L decides to sell the generation assets to a third-party, the Commission will require DP&L to provide the fair market value, no less than 30 days prior to the transaction. Further, we agree that the sale of the divestiture of the generation assets constitutes an extraordinary event. Consistent with our past practice, the financial impact of the divestiture should be excluded from the SEET test. *See, in re Ohio Edison Co., Cleveland Elec. Illum. Co., and Toledo Edison Co.,* Case No. 10-1265-EL-UNC, Opinion and Order (November 22, 2010) at 3. As to DP&L's additional requests, we address each request individually below.

A. Service Stability Rider

(23) DP&L asserts that the Commission should uphold its prior authorization of the SSR. DP&L requests that the Commission find that collection of the SSR should continue regardless of the timing of the generation asset divestiture. (DP&L Supp. App. at 3; DP&L Am. Supp. App. at 10-11.)

IEU-Ohio, OEG, and OCC argue that the Commission should deny DP&L's request to continue the SSR, and should instead terminate the SSR after the generation assets are divested. IEU-Ohio and OCC assert that the SSR is

unlawful and unreasonable. IEU-Ohio, OEG, and OCC argue that after DP&L divests its generation assets, DP&L will be a regulated electric distribution utility that will no longer be impacted by the performance of the generation assets. Additionally, OCC argues that the doctrine of collateral estoppel precludes the Commission from re-litigating the SSR. (IEU-Ohio Supp. Comments at 7-8; IEU-Ohio Am. Supp. Comments at 9-11; OCC Supp. Comments at 5-9; OCC Am. Supp. Comments at 11-14; OEG Supp. Comments at 1-4.)

In reply to the parties' arguments, DP&L asserts that in *ESP II* the Commission already addressed the arguments raised by parties regarding the SSR. *See ESP II*, Opinion and Order (Sep. 4, 2013) at 17-28, Second Entry on Rehearing (Mar. 19, 2014) at 2-18, Fourth Entry on Rehearing (Jun. 4, 2014) at 5-6, 7-9. Additionally, DP&L asserts that it should be permitted to continue to collect the SSR because the Commission authorized AEP to continue to collect its stability rider after its generation assets were transferred. *See In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., (*AEP ESP*), Opinion and Order (Aug. 8, 2012) at 36, 57.

(24) The Commission finds that DP&L should continue to collect the SSR notwithstanding DP&L's divestiture of its generation assets. We note that, in the approving *ESP II*, the Commission both authorized the establishment of the SSR in order to allow DP&L to maintain its financial integrity and directed DP&L to divest its generation assets. We also agree with OCC that the parties should not engage in re-litigating the SSR, which we fully addressed in the *ESP II* proceeding. *ESP II*, Opinion and Order (Sep. 4, 2013) at 17-28, Second Entry on Rehearing (Mar. 19, 2014) at 2-18, Fourth Entry on Rehearing (Jun. 4, 2014) at 5-6, 7-9. Additionally, as we noted in *ESP II*, our decision permitting DP&L to collect stability revenues after divestiture is consistent with our treatment with respect to both AEP and Duke. *ESP II*, Entry on Rehearing (Jun. 4, 2014) at 5-6, 7-9; *AEP ESP*, Entry on Rehearing (Jan. 30, 2013) at 26-27; *AEP Corporate Separation*, Finding and Order (Oct. 17, 2012) at 23-24; *Duke ESP*, Opinion and Order (Nov. 22, 2011) at 13, 21. However,

consistent with our decision in *ESP II*, no revenues collected under the SSR or SSR-E may be transferred to any current or future affiliate of DP&L. *See ESP II*, Opinion and Order (Sep. 4, 2013) at 26.

B. Environmental Liabilities

(25) DP&L initially requested that the Commission authorize it to retain responsibility for future environmental liabilities associated with DP&L's historic ownership of its generation facilities. DP&L asserted that incurrence of the liabilities would have been directly related to the rendering of SSO service to customers. Further, DP&L proposed to retain responsibility for the environmental liabilities in order 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, in compliance with federal and state rules and regulations. DP&L asserted that the remediation process could take years to complete and involve significant expenditures, for which DP&L intended to seek cost recovery. (DP&L Supp. App. at 3-5; DP&L Am. Supp. App. at 11-12.)

AEP-Gen, IEU-Ohio, OEG, RESA, OMA Energy, Miamisburg, and OCC argued against DP&L's initial request to permit it to retain the environmental liabilities. The parties argued that the environmental liabilities should be transferred with the associated generation assets. (AEP-Gen Supp. Comments at 3-4; IEU-Ohio Supp. Comments at 10-11; IEU-Ohio Am. Supp. Comments at 11-12; OEG Supp. Comments at 4-6; RESA Supp. Comments at 3-4; OMA Energy Supp. Comments at 4-5; Miamisburg Am. Supp. Comments at 2-4; OCC Supp. Comments at 9-15; OCC Am. Supp. Comments at 15-18; OCC Am. Supp. Reply at 9-10)

Staff asserted that the Commission should reiterate the same conditions it placed upon Duke and AEP for the transfer of their generation assets. Specifically, Staff argued that the Commission should require that all liabilities transfer along with the assets and that the Commission should deny DP&L's request to create a deferral for the liabilities. (Staff Supp. Comments at 3; Staff Am. Supp. Comments at 3.)

(26) Nonetheless, in its amended supplemental reply comments, DP&L agreed to transfer the future environmental liabilities with its generation assets, in order to carry out its separation and to maintain consistency with the Commission's Orders in AEP's and Duke's generation asset transfer cases (DP&L Am. Supp. Reply at 4).

(27) The Commission finds that DP&L should transfer the environmental liabilities with the generation assets, consistent with DP&L's representation that it has agreed to do so. Therefore, we direct DP&L to include provisions in any contract or other agreement to divest the generation assets which transfer all environmental liabilities with the assets and which fully insulates ratepayers from any potential recovery of the costs of any such environmental liabilities. We find that DP&L's agreement to transfer the environmental liabilities with the generation assets resolves the issues raised in the comments and reply comments by Staff and the parties. Further, we find that this is consistent with our decision regarding treatment of future environmental liabilities in AEP's generation asset transfer. *AEP ESP*, Opinion and Order (Aug. 8, 2012) at 59.

C. Costs of Sale

(28) DP&L requests that it be permitted to recover all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes, and related costs that it incurs to transfer its generation assets. DP&L asserts that it should be permitted to recover the costs that it incurs, while costs incurred by the newly created generation affiliate, or a third party, should be borne by the generation affiliate or third party. DP&L indicates that in a transfer of the generation assets to an affiliate, these costs are estimated at up to $10 million. DP&L avers that it does not object to Staff's review of these expenses for reasonableness before recovery is authorized. (DP&L Supp. App. at 5; DP&L Am. Supp. Reply at 12-13.)

OEG, OCC, FES, and IEU-Ohio argue that the Commission should not permit DP&L to recover financing costs, redemption costs, amendment fees, investment banking fees,

advisor costs, taxes, and related costs that it incurs to divest its generation assets. The parties argue that these costs are generation-related and should not be recoverable from customers. (OEG Supp. Comments at 6; OCC Supp. Comments at 15-17; OCC Am. Supp. Comments at 19-20; IEU-Ohio Am. Supp. Comments at 14-15; FES Am. Supp. Comments at 3.)

Staff recommends that DP&L document all costs incurred during the divestiture and make a separate filing in the future for all costs that it seeks to recover. Staff asserts that this will provide it with an opportunity to review the prudency of the costs and make a recommendation of the costs that should be deemed eligible for recovery from DP&L customers. (Staff Am. Supp. Comments at 4.)

(29) The Commission finds that DP&L should be permitted to defer all financing costs, redemption costs, amendment fees, investment banking fees, advisor costs, taxes, and related costs that it incurs to transfer its generation assets. However, these costs will be subject to Staff review to determine if they are reasonable and prudently incurred. Additionally, the Commission directs DP&L to document all expenses associated with the divestiture, and to file any request for recovery in a separate docket.

D. DP&L's Interest in OVEC

(30) DP&L requests that it be permitted to retain its interest in OVEC, including the OVEC contractual entitlements, and retain the rights and obligations under OVEC's Restated Inter-Company Power Agreement (ICPA). DP&L argues that it would be unsuccessful in obtaining the required consents to divest its interests in OVEC. DP&L asserts that recent events regarding other OVEC sponsoring companies being unable to obtain consent to transfer their interest in OVEC to a generation affiliate lead DP&L to believe that it would be equally unsuccessful. DP&L asserts that it will seek resolution of rate matters regarding OVEC in a separate proceeding. (DP&L Supp. App. at 5-7; DP&L Am. Supp. App. at 13-14.)

Additionally, DP&L requests that the Commission grant accounting authority pursuant to R.C. 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. DP&L proposes to defer these expenses for future recovery from all customers, beginning at a date to be determined in a subsequent Commission proceeding. Until fully recovered, DP&L requests that the Commission authorize it to recover carrying costs based upon its most recently approved cost of debt, to be applied to the unrecovered deferral balance and deferred for future recovery. (DP&L Supp. App. at 5-7; DP&L Am. Supp. App. at 13-14.)

Direct Energy argues that DP&L should be required to ensure that the power (capacity, energy, and ancillary services components) from the OVEC assets are sold into the PJM Interconnection, LLC (PJM) market. Direct Energy asserts that this would be consistent with the Commission's treatment of AEP when it attempted to divest its interest in OVEC. (Direct Energy Comments at 2; Direct Energy Supp. Comments at 1-2.)

IEU-Ohio, RESA, and OCC argue that DP&L's proposal to retain its interest in OVEC and to accrue carrying costs on its OVEC expenses before seeking to collect those expenses is unlawful and unreasonable. Additionally, IEU-Ohio asserts that, pursuant to the ICPA, DP&L is permitted to transfer its ownership interest in OVEC to a third party upon notice to the sponsoring companies. (IEU-Ohio Supp. Comments at 17-18; IEU-Ohio Am. Supp. Comments at 12-13; RESA Supp. Comments at 4; OCC Supp. Comments at 18-19; OCC Am. Supp. Comments at 21-23; OCC Am. Supp. Reply at 11-12.)

Staff argues that DP&L should be required to make a good faith attempt to transfer its interest in OVEC and file in this docket the details and results of that attempt. Staff asserts that if DP&L demonstrates that the other member entities deny DP&L's request, then DP&L should be permitted to retain its interest in OVEC. However, Staff asserts that if OVEC permits DP&L to transfer or sell the asset, then DP&L should be required to request such authority pursuant to a separate application. Additionally, Staff recommends that

the Commission deny DP&L's request for deferral authority for costs related to OVEC, and require DP&L to file a separate application when such costs are being incurred. (Staff Supp. Comments at 4-5; Staff Am. Supp. Comments at 4.)

DP&L reasserts on reply that it has no reason to believe or expect that the OVEC sponsoring companies would consent to DP&L's transfer of its interests. DP&L requests that it not be required to go through the timely process of seeking consent, which would only result in additional delay and a need to amend DP&L's generation asset divestiture plan again. Additionally, DP&L refutes IEU-Ohio's contention that the ICPA permits DP&L to transfer its interest in OVEC without approval from the OVEC sponsoring companies. (DP&L Am. Supp. Reply at 13-14.)

(31) The Commission finds that DP&L should make a good faith effort to divest its interest in OVEC. We agree with Staff that DP&L should, at the very least, attempt to obtain consent from the OVEC sponsoring companies to divest its interest in OVEC so that it can fully divest its generation assets.

However, if DP&L is not permitted to transfer its ownership interest in OVEC, it should cause the energy from its OVEC contractual entitlements to be sold into the day-ahead or real-time PJM energy markets, or on a forward basis through a bilateral arrangement. Any forward bilateral sales must be done at a liquid trading hub at the then-current market wholesale equivalent price. Intercontinental-Exchange or a similar publicly available document shall be used as a form of measure of the then-current market wholesale equivalent pricing. Staff, or, at the Commission's discretion, an independent auditor, shall periodically audit DP&L's records to ensure compliance with this provision.

We find that this requirement should apply during DP&L's current ESP period and beyond, until the OVEC contractual entitlements can be transferred to the DP&L generation affiliate or otherwise divested, or until otherwise ordered by the Commission. If DP&L seeks to deviate from selling the

OVEC power into the PJM market, the Company must request and obtain prior Commission approval.

We find that DP&L's proposal to retain the OVEC contractual entitlements, while liquidating the power delivered under the ICPA through the PJM market, will ensure that the divestiture of DP&L's generation assets is substantially completed, while granting DP&L and the Commission flexibility for DP&L to divest its interest in OVEC at a later date.

E. DP&L's Debt Ratio

(32) DP&L requests that it be permitted to temporarily maintain total long term debt of $750 million or total debt equal to 75 percent of rate base, whichever is greater. DP&L notes that the Commission has required that DP&L maintain a capital structure that includes an equity ratio of at least 50 percent. *In re The AES Corporation,* Case No. 11-3002-EL-MER, (*DP&L Merger*) Finding and Order (Nov. 22, 2011) at 9, 12. DP&L now requests temporary relief from the Commission's requirement. DP&L asserts that it has adhered to this commitment, but the Commission's subsequent directive ordering DP&L to divest its generation assets requires DP&L's equity ratio to fall below the 50 percent level due to the debt restructuring necessary to achieve divestiture. DP&L requests that it be permitted to temporarily maintain an increased debt level and corresponding capital structure through at least 2018, after which further debt reductions would be conditioned on market recovery and an ability to reallocate debt to DP&L's non-regulated affiliate. (DP&L Supp. App. at 8; DP&L Am. Supp. App. at 14-16.)

OCC and IEU-Ohio argue that the Commission should deny DP&L's request to waive the requirement for it to maintain a capital structure of 50 percent debt to 50 percent equity. Additionally, OCC argues that if the Commission permits DP&L to temporarily maintain an imbalanced capital structure, then it should prohibit DP&L from paying dividends until it restores its capital structure, as agreed to by DP&L in *DP&L's Merger. DP&L Merger,* Finding and

Order (Nov. 22, 2011) at 9, 12. (OCC Supp. Comments at 20-21; OCC Am. Supp. Comments at 23-24; IEU-Ohio Supp. Comments at 18-20; IEU-Ohio Am. Supp. Comments at 13.)

Staff argues that DP&L has failed to provide adequate support for the Commission to permit such a high debt ratio. Further, Staff asserts that it would be imprudent for DP&L to carry such a high debt ratio. Staff argues that the SSR was set under the assumption of a balanced capital structure, and that to permit DP&L to maintain a capital structure of 75 percent debt to 25 percent equity would be very aggressive. Staff proposes that DP&L explore the use of an intercompany note whereby DP&L retains the generation debt, contingent upon a showing to the Commission that retention of the debt is absolutely necessary, but that associated debt is serviced by DPL Inc. Additionally, Staff recommends that the Commission maintain the requirement that DP&L have positive retained earnings, which the Commission ordered in the *DP&L Merger*. *DP&L Merger*, Finding and Order (Nov. 22, 2011) at 9-12. Finally, Staff asserts that, if the Commission grants DP&L's request to temporarily maintain an adjusted capital structure, the Commission should prohibit DP&L from paying dividends until it returns to, and maintains, a capital structure of 50 percent debt to 50 percent equity. (Staff Supp. Comments at 5-7.)

In reply, DP&L argues that the Commission should deny the positions supported by OCC and IEU-Ohio. DP&L argues that the *DP&L Merger* does not establish DP&L's capital ratio in perpetuity and that it is well-settled that the Commission may reconsider its prior order, provided that it explains its reason for doing so. *DP&L Merger*, Finding and Order (Nov. 22, 2011); *see Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶14. In this case, DP&L argues that the Commission's directive in *ESP II* that DP&L divest its generation assets is a significant change in circumstances for the Company. DP&L asserts that this significant change requires a temporarily adjusted capital structure. Further, DP&L argues that the Commission should deny OCC's and Staff's request that DP&L be prohibited from paying dividends to its investors

until it returns to a balanced capital structure. DP&L argues that this would be unreasonable and would constitute an unlawful taking by depriving DP&L shareholders of the benefits of their investment. DP&L asserts that utility investors are entitled to earn a reasonable return on their investment and denying DP&L the right to pay dividends would constitute a taking. *Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 562-63, 589 N.E.2d 1292 (1992) (per curiam) (*quoting Fed. Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281 (1944)). Finally, DP&L argues that the corporate affiliate receiving the generation assets would have no debt-carrying capacity; therefore no debt could be transferred to it. (DP&L Am. Supp. Reply at 10-12.)

(33) The Commission finds that DP&L's request to temporarily maintain total long term debt of $750 million or total debt equal to 75 percent of rate base, whichever is greater should be granted. Initially, we note that we agree with DP&L that the newly-created generation affiliate will have limited debt-carrying capacity. Additionally, divesting generation assets with a net book value of $1,576,440,886 is a significant change in circumstances for the Company, which makes it necessary for DP&L to temporarily maintain an adjusted capital structure. However, we do not intend to eliminate DP&L's commitment to maintain a balanced capital structure. We find that DP&L should only be granted temporary relief from its commitment in *DP&L's Merger. DP&L Merger*, Finding and Order (Nov. 22, 2011) at 9-12. Therefore, we find that, unless otherwise ordered by the Commission, DP&L should be permitted to maintain an adjusted capital structure until January 1, 2018, after which DP&L is required to maintain a capital structure of 50 percent debt to equity. In the event that DP&L is unable to achieve the required capital structure by January 1, 2018, DP&L should file an application with the Commission no later than January 1, 2017. In its application, DP&L should explain why it is unable to achieve a capital structure of 50 percent debt to equity and detail the steps DP&L will take to reduce its debt and achieve a balanced capital structure. Additionally, we find that DP&L must abide by its commitment to maintain positive retained earnings, which it

also agreed to in the *DP&L Merger*. *DP&L Merger*, Finding and Order (Nov. 22, 2011) at 9-12.

III. Effect of Divestiture on SSO Service

(34) Pursuant to Ohio Adm.Code 4901:1-37-09(C)(2), an application to sell or transfer generating assets shall, at a minimum, demonstrate how the sale or transfer will affect the current and future SSO established pursuant to R.C. 4928.141.

(35) DP&L asserts that the divestiture of its generation assets will not have a material effect on the terms and conditions under which it will provide SSO service. Specifically, DP&L asserts that as a result of *ESP II*, it will provide SSO service to customers through a blend of DP&L's then-existing rates and the rates established through a competitive bidding process. DP&L argues that the asset divestiture will have no material effect on SSO rates. (DP&L Initial App. at 7-8; DP&L Supp. App. at 9-10; DP&L Am. Supp. App. at 17.)

IEU-Ohio, FES, and Staff argue that DP&L has not demonstrated the effect of the divestiture on SSO service and that the effect on SSO service cannot be known without a complete application. Further, they assert that the uncertainty about when DP&L will divest the generation assets prevents any manner of identifying the impact of the transaction on SSO rates. (IEU-Ohio Initial Comments at 4; IEU-Ohio Supp. Comments at 5-7; IEU-Ohio Am. Supp. Comments at 8-9; FES Supp. Comments at 4-5; FES Am. Supp. Comments at 5-6; Staff Supp. Comments at 2.)

DP&L argues in reply that 100 percent of DP&L's SSO will be supplied through competitive bidding before the deadline for DP&L to divest its generation assets. Therefore, DP&L asserts that the SSO rates approved in the ESP will not increase or decrease during the term of the ESP. (DP&L Supp. Comments at 6; DP&L Am. Supp. Reply at 15.)

(36) The Commission finds that DP&L has satisfied the requirement of Ohio Adm.Code 4901:1-37-09(C)(2) by demonstrating that the divestiture will not affect the current

or future SSO rates established in *ESP II* pursuant to R.C. 4928.143. As we found in *ESP II*, DP&L's SSO rates will be increasingly supplied through competitive bidding until it achieves a fully market-based SSO rate. *ESP II*, Opinion and Order (Sept. 4, 2013) at 12-17, Second Entry on Rehearing (Mar. 19, 2014) at 18-19, Fourth Entry on Rehearing (June 4, 2014) at 3-4. Accordingly, the transfer or sale of DP&L's generation assets will have no effect on the market-based rates that DP&L charges its SSO customers.

IV. Public Interest

(37) Pursuant to Ohio Adm.Code 4901:1-37-09(C)(3), an application to sell or transfer generating assets shall, at a minimum, demonstrate how the proposed sale or transfer will affect the public interest.

(38) DP&L asserts that the Commission found in *ESP II* that separating its generation assets was a benefit of DP&L's ESP and was in the public interest. *ESP II*, Opinion and Order (Sept. 4, 2013) at 51.

IEU-Ohio argues that the Commission has not already determined the asset transfer to be in the public interest and that the Commission could make no such finding without knowing the terms and conditions of the sale (IEU-Ohio Comments at 5).

(39) The Commission finds that DP&L has satisfied Ohio Adm.Code 4901:1-37-09(C)(3) by demonstrating that the proposed divestiture will benefit the public interest. Initially, we note that we determined that divesting the generation assets would be in the public interest when we ordered DP&L to do so in *ESP II*. We also found that divestiture will benefit the public interest by implementing a fully competitive retail market in DP&L's service territory in accordance with R.C. 4928.02(B) and (C). We indicated that this benefits the public interest by providing the public with market pricing for electric generation service. *ESP II*, Opinion and Order (Sept. 4, 2013) at 51. Accordingly, having reviewed DP&L's application to divest its generation assets, we find that the divestiture is in the public interest

and will further the policies of the state of Ohio in R.C. 4928.02.

V. Net Book Value and Fair Market Value

(40) Pursuant to Ohio Adm.Code 4901:1-37-09(C)(4), an application to sell or transfer generating assets shall, at a minimum, state the fair market value and book value of all property to be transferred from the electricity utility, and state how the fair market value was determined.

(41) DP&L asserts that the net book value of its generating assets as of November 30, 2013, is approximately $1,576,440,886. Additionally, DP&L seeks a waiver of the requirement in Ohio Adm.Code 4901:1-37-09(C)(4) to state the fair market value of its generation assets. DP&L argues that the granting of its motion for waiver would be consistent with the Commission's decision in AEP's and Duke's generation asset transfer cases. *See AEP Corporate Separation*, Opinion and Order (Oct. 17, 2012) at 12-13; *Duke ESP*, Opinion and Order (Nov. 22, 2011) at 46. Additionally, DP&L has represented that it currently intends to transfer its generation assets to an affiliate at net book value, so DP&L claims that the fair market value of the assets would provide little or no benefit in determining whether the transaction benefits the public interest (DP&L Initial App. at 8-9; DP&L Am. Supp. Reply at 4).

OCC, IEU-Ohio, and FES argue that the Commission should deny DP&L's waiver request of Ohio Adm.Code 4901:1-37-09(C)(4) and require DP&L to state the fair market value of the assets. Additionally, OCC, IEU-Ohio, and FES argue that Ohio Adm.Code 4901:1-37-09(C)(4) requires that the fair market value of the assets be provided to assist the Commission in determining if the divestment is in the public interest. Additionally, FES asserts that the fair market value must be stated in the application, not in a supplemental filing to the application. (OCC Comments at 9-10; IEU-Ohio Comments at 5-6; FES Supp. Comments at 6; FES Am. Supp. Comments at 7.)

Staff asserts that net book value provides a known and measurable value, and protects the utility and ratepayers from excessive losses due to fluctuations in value based on changing market conditions. Staff argues that DP&L should transfer its assets at net book value in keeping with Commission precedent and maintaining similar treatment as was afforded to other electric utilities in Ohio. (Staff Am. Supp. Comments at 2.)

(42) The Commission finds that DP&L should be authorized to transfer its generation assets to an affiliate at net book value. Additionally, we find that DP&L's motion for waiver of the requirement in Ohio Adm.Code 4901:1-37-09(C)(4) to state the fair market value is reasonable and should be granted. Since DP&L has stated the net book value of the assets, and is currently proposing to transfer the assets at net book value, we find that there would be little or no benefit to knowing the fair market value of the generation assets at this time. We note that, when we adopted Ohio Adm.Code 4901:1-37-09(C)(4), we held that the fair market value could be helpful in determining whether the transfer is in the public interest. *In re the Adoption of Rules*, Case no. 08-777-EL-ORD, Entry on Rehearing (Feb. 11, 2009) at 19. In the present case, we find that the transfer to an affiliate at net book value is in the public interest and is consistent with Commission precedent. However, in the event that DP&L decides to sell the generation assets to a third-party, DP&L is directed to supplement its application with the fair market value, no less than 30 days prior to the transaction.

VI. Conclusion

(43) Upon review of DP&L's application as supplemented on February 25, 2014, and amended on May 23, 2014, to divest its generation assets, as well as the comments and reply comments, the Commission finds that the application is reasonable, complies with R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37, and is in the public interest. Accordingly, the Commission finds that DP&L's application to divest its generation assets should be approved.

It is, therefore,

ORDERED, That DP&L's application as supplemented on February 25, 2014, and amended on May 23, 2014, to divest its generation assets be approved, subject to the conditions set forth in this Finding and Order. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

GAP/sc

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Barcy F. McNeal
Secretary