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Public Utilities Commission of Ohio
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In Re: Case No. 08-1094-EL-SSO, et al.

Greetings:

Cargill Incorporated files its Reply Brief in the above proceeding via fax today.
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Regards



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Attorney for Cargill, Incorporated

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 08-1094-EL-SSO
Approval of its Electric Security Plan)	
)	
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 08-1095-EL-ATA
Approval of Revised Tariffs)	
)	
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 08-1096-EL-AAM
Approval of Certain Accounting Authority)	
Pursuant to Ohio Rev. Code 4905.13)	
)	
)	
In the Matter of the Application of)	
The Dayton Power and Light Company for)	Case No. 08-1097-EL-UNC
Approval of its Amended Corporate)	
Separation Plan)	
)	

REPLY BRIEF ON BEHALF OF CARGILL, INCORPORATED

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Introduction

Cargill intervened in these proceedings to protect its interests, not represented by an existing party, and to contribute to the just and expeditious approval of the proposed Electric Security Plan ("ESP") filed by Dayton Power & Light ("DP&L"). Cargill's earlier intervention in DP&L Case No. 05-276-EL-AIR resulted in signing the stipulation that extended the rate stabilization plan through 2010 ("2005 Plan"),¹ and established the Rate Stabilization Surcharge ("RSS").²

Cargill, a mercantile customer,³ purchases delivery services from DP&L, and competitive generation from a CRES supplier, for its facilities in Dayton and Sidney. DP&L serves Cargill Dayton at primary substation voltage, and Cargill Sidney at primary voltage.⁴ Cargill's Dayton and Sidney facilities are not part of an aggregation group.⁵

In this proceeding, a proposed ESP Stipulation modifies the ESP set forth in the application. Cargill refused to sign the ESP Stipulation because paragraph 3 unreasonably denies all customers during 2011 and 2012 the right to avoid paying RSS charges by agreeing to return to DP&L POLR service at market-based rates. The opinion and order of the Commission needs to further modify the ESP and the ESP Stipulation for the benefit of ratepayers and in the public interest. A modified paragraph 3 should provide that all customers, whether or not part of government aggregation, may elect not to pay RSS charges upon agreeing to return to DP&L POLR service during 2011 and

¹ In Re DP&L, Case No. 05-276-EL-AIR, Opinion and Order, dated December 28, 2005 ("RSP Decision") approving with modifications the RSP Stipulation filed November 3, 2005 ("RSP Stipulation").

² DP&L refers to the RSS as the Rate Stabilization Charge ("RSC").

³ A "mercantile customer" consumes, as a commercial or industrial customer, more than 700,000 kWh/year, or receives service as part of a national account (RC 4928.01 (A)(19)).

⁴ Cargill Ex. 1, pg. 3 (M. Frye Test.).

⁵ Tr. Pg. 33, lines 21-25 (February 24, 2009).

2012 by paying market based rates for that service. In 2013, all customers may return at SSO rates unless the Commission approved plan provides otherwise.

Statement of the Case

The ESP application continues the approved 2005 Plan through its intended termination date of December 31, 2010. The ESP makes changes to the plan by allowing for current or deferred recovery of fuel costs incurred during 2009 and 2010. The ESP also requires all customers to return to DP&L POLR service during 2009 and 2010 at market-based rates.⁶ Cargill opposed those proposed changes on the basis the 2005 Plan should continue unchanged through 2010.⁷

The ESP Stipulation, not signed by Cargill, materially modifies the ESP application by extending the 2005 Plan for two more years, through 2012. A new adjustable fuel clause not provided for by the 2005 Plan allows DP&L to timely recover its fuel costs during 2010 through 2012. The RSS approved in 2005 continues at its current rates through 2012 for DP&L to recover POLR costs. During 2010, all customers, as provided for by the 2005 Plan, pay the non-bypassable RSS to return at SSO rates.

In 2011 and 2012, after the expected end of the 2005 Plan, all customers continue to pay the non-bypassable RSS charges to return at SSO rates. However, customers

⁶ RC 4928,143 (D) continues the current plan through its approved termination; fuel recovered changed by Ex. 5, ESP filing, SSO Book I, Chapter 5; and market-based rates proposed under Ex. 5, ESP filing, SSP Book I, Chapter 2.

⁷ Mark Frye testimony filed January 26, 2009, pg. 3 et. seq.; testimony later withdrawn by Cargill at the February 24, 2009 hearing, and by Honda under the ESP Stipulation.

shopping as part governmental aggregation may elect to avoid the RSS by agreeing to return to DP&L POLR services at market-based rates.⁸ Paragraph 3 states that:

“The current RSS charge will continue as a nonbypassable⁹ charge through December 31, 2012. Through December 31, 2012, shopping customers who return to DP&L shall pay the Standard Service Offer (“SSO”) rate under the applicable tariff. In 2011 and 2012, governmental aggregation customers who elect not to pay the RSS will return to DP&L at a market-based rate. DP&L will develop and file for approval a market-based rate calculated consistent with Section 4928.20(J), Revised Code, by July 1, 2010.”¹⁰

The ESP application, as modified by the proposed ESP Stipulation, requires further modification to benefit ratepayers and advance the public interest. All customers during 2011 and 2012 who elect to mitigate DP&L’s stand-by costs by returning at market-based rates to its POLR service should avoid RSS charges.

Factual and Legal Arguments

1. The ESP Stipulation does not substitute for the exercise of Commission Judgment.

DP&L presents the ESP Stipulation as being “entitled to substantial deference by the Commission.”¹¹ The ESP Stipulation still remains “*** merely a recommendation *** in no sense legally binding upon the commission***” since evidence presented at hearings determines whether just and reasonable. *Consumers Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125, 592 N.E. 2d 1370, 1373, citing *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 384 N.E. 2d 264, 273.

⁸ ESP Stipulation and Recommendation, filed February 24, 2009 (“ESP Stipulation”), pgs. 3-4, par. 1-3.

⁹ Cargill’s initial brief, at pg. 5, inadvertently hyphenated the quoted word “nonbypassable”.

¹⁰ ESP Stipulation, pg. 4, par. 3.

The ESP Stipulation does not substitute for the exercise of Commission judgment as to the public interest based on “specialized expertise and discretion,” on factual matters, and “accumulated expertise” in interpreting statutes. *Monongahela Power Co. v. Pub. Util., Comm.* (2004), 104 Ohio St. 3d 571, 578, 820 N. E. 2d 921, 927-928.

2. Responses to Commission Staff and IEU-Ohio.¹²

Staff describes the ESP Stipulation as fundamentally extending the RSS for two years, until 2012, but with one change.¹³ Staff ignores the approved 2005 Plan and its RSS charges intended to end on December 31, 2010. The ESP Stipulation materially modified the plan by extending its term and the recovery of RSS charges through 2012.

Particularly, Staff ignores the unfairness and inconsistency of paragraph 3 that allows customers, as part of government aggregation, to avoid RSS charges by returning at market-based rates, while denying those rights to other customers whose return to market-based rates likewise mitigate DP&L POLR costs.

Staff offers a highly doubtful solution prompted by IEU-Ohio that Cargill could become a member of a government aggregation group to avoid RSS charges and return at market-based rates.¹⁴

Staff presents a hypothetical solution to a very real problem. No evidence in the record exists that such government aggregation groups even exist, or would aggregate for mercantile customers. Even if such aggregation groups exist between now and 2012, there is no evidence to show whether those groups function as “real” aggregators, or because of this ESP Stipulation. Further, no evidence exists that Cargill benefits from

¹¹ IEU-Ohio’s Brief specifically does not address modification of the ESP Stipulation at paragraph 3.

¹² DP&L Br. at pg. 1.

¹³ Staff Br. at pg. 8.

aggregation when CRES providers price generation provided to aggregated loads based on the high and load profiles, and high and low creditworthiness of the entire group.¹⁵

As more fully discussed in response to DP&L's arguments, the legal and factual basis for benefiting ratepayers and the public interest, consistent with RC 4928.20, results from the Commission exercising its specialized expertise and discretion to modify paragraph 3. All shopping customers should have the right to avoid DP&L's RSS charges upon agreeing to, and returning to, POLR service at market rates during 2011 and 2012.

3. Responses to DP&L.

DP&L first argues no SB 221 mandate or regulatory requirement exist for changing paragraph 3 since the Commission twice approved non-bypassable RSS charges.¹⁶ Those approvals intend, however, for the 2005 Plan and its RSS charges to end December 31, 2010. Cargill supports continuation of non-bypassable RSS charges through 2010 as those orders provide.

Commission treatment of RSS charges during 2011 and 2012 is now the issue. DP&L views RC 4928.20 and RC 4928.143 as working at cross-purposes. RC 4928.20 restricts use of shopping limitations provided for under RC 4928.143 (B) (2) (d) by allowing customers of government aggregation to return at market-based rates by statutorily elected not to pay RSS charges.¹⁷

¹⁴ Staff Br. at pg. 9, citing to Tr. 39-40 (February 24, 2009).

¹⁵ Id.

¹⁶ DP&L Br. at pg. 9

¹⁷ DP&L Br. at pg. 9

Under paragraph 3, the ESP Stipulation provides DP&L the agreed upon right to continue charging for two more years RSS charges. DP&L relies on RC 4928.143 (B) (2) (d) to limit shopping by continuing non-bypassable RSS charges for all customers, other than those of government aggregation, during 2011 and 2012.¹⁸ DP&L still needs Commission approval of that language.

Approval of paragraph 3 to limit shopping opportunities for Cargill and other customers not part of government aggregation fails to benefit ratepayers and the public interest because customers avoiding RSS charges mitigate DP&L POLR costs by returning to, and paying for, market-based rates.

Second, DP&L argues Cargill failed to review the stipulation as a “package.”¹⁹ DP&L focuses on Cargill witness Frye who presented expert testimony on certain aspects of the ESP Stipulation and specifically addressed paragraph 3. Cargill, as a capable and knowledgeable participant, considered the ESP Stipulation as a package, and refused to sign it upon finding paragraph 3 unreasonable. Cargill now seeks Commission protection from provisions within paragraph 3 not to the benefit of ratepayers or in the public interest.

Commission consideration of Cargill’s objection occurs before, or as part, of its three-pronged test review for reasonableness. Objection by Cargill pertains to prong two of that test to require further modification to benefit ratepayers and the public interest. A modified paragraph 3 becomes part of Commission consideration on whether the ESP Stipulation meets the second-prong of that test.

¹⁸ DP&L Br. pg. 9

¹⁹ DP&L Br. pg. 10

Third, DP&L argues Cargill takes different positions,²⁰ which misses the obvious. DP&L changes the facts. Cargill opposed the ESP application whereunder the 2005 Plan continued through 2010, but with different terms and conditions. Cargill found especially egregious DP&L changing the agreed to 2005 Plan by requiring that returning customers pay for POLR services at market-based rates while continuing to pay non-bypassable RSS charges.

Cargill believes the 2005 Plan applies without change until December 31, 2010. Cargill never agreed to extending the 2005 Plan and non-bypassable RSS charges past 2010, or DP&L timely recover fuel costs through a new adjustment mechanism prior to 2010, as the ESP Stipulation now provides.²¹

DP&L mischaracterizes the facts by arguing Cargill received what asked for, and demands more, under the ESP Stipulation presented as some sort of consensus among the private or collective signatories, without reflecting their individual positions.²²

The ESP Stipulation changes the 2005 Plan into an entirely new plan for service during 2011 and 2012. For those years, the Commission needs to modify paragraph 3 to benefit ratepayers and the public interest by allowing customers not part of government aggregation to avoid RSS charges upon agreeing to return to POLR service at market-based rates.

Fourth, DP&L argues the AEP-Ohio Decision should not alter the ESP Stipulation package.²³

²⁰ DP&L Br. pg. 10

²¹ ESP Stipulation, pg. 2, par. 1-3

²² DP&L Br. pg. 11; ESP Stipulation, pg. 18., par. 35.

²³ DP&L Br. pg. 12.

The AEP-Ohio Decision recognizes some risks occur from customer switching and returning to POLR service as contracts near end during rising market prices. The Commission properly concluded that customers of government aggregators or separate CRES suppliers returning to, and paying at market prices, for POLR services mitigate those risks.²⁴ Avoidance of the POLR charge is the exchange for that commitment.²⁵

The Commission further found POLR charges avoided by customers of government aggregation or individual CRES providers in exchange for returning at, and paying for, market-based rates produce an outcome “consistent” with the election allowed under RC 4928.20 (J) for government aggregations to avoid paying stand-by charges upon agreeing to return at market price for power.²⁶

The ESP Stipulation provides an outcome inconsistent with the AEP-Ohio Case by not allowing all shopping customers to avoid RSS charges and return at market-based rates. Shopping customers not part of government aggregation continue to pay the RSS charges and return at SSO rates during 2011 and 2012 under paragraph 3, despite mitigation measures available to avoid those costs as recognized in the AEP-Ohio Decision.

DP&L defends this unjust and unreasonable result by arguing the AEP-Ohio Decision should not alter the settlement package reached in this proceeding. The AEP-Ohio Decision provides very useful guidance for the Commission to find that paragraph 3, as now written, fails to benefit ratepayers and the public interest.

²⁴ In Re Application of Columbus Southern Power Company and Ohio Power Company for Approval of Electric Security Plans, Opinion and Order, dated March 18, 2009, Case No. 08-917-EL-SSO et al, and Case No. 08-918-EL-SSO et al. (“AEP-Ohio Case”), at pg. 39-40.

²⁵ Id at 40.

²⁶ Id at 40, “requirement” inadvertently capitalized in the Cargill Initial Brief at pg. 11.

The AEP-Ohio Decision should likewise apply to the facts in this case. Consistent with RC 4928.20 (J), and to the benefit of ratepayers and the public interest, paragraph 3 of the ESP Stipulation should allow all DP&L customers the right to avoid RSS charges in exchange for returning to, and paying for, POLR service at market-based rates. Those payments mitigate the need for DP&L to collect non-bypassable RSS charges to recover POLR costs.

DP&L intends with Commission approval to limit shopping through the collection of non-bypassable RSS charges from all customers except those as part of government aggregation by implementation of paragraph 3.

The collection of non-bypassable RSS charges to limit shopping is unreasonable under the circumstances, not beneficial to ratepayers, and not in the public interest especially since returning customers assumes the risks of market prices, and mitigate the harm to DP&L.

Paragraph 3 requires modification prior to Commission consideration on whether, as a package, the ESP Stipulation is reasonable under the second of the three-prong test.

The codified policies of RC 4928.02 guide Commission implementation of Chapter 4928. DP&L acknowledges the need for compliance with those policies by its ESP application and ESP Stipulation. DP&L uses witness Kelly's testimony in Book I as support for both. However, Mr. Kelly only addresses the ESP application. DP&L infers without testimonial or record support the ESP Stipulation also complies with state policy.

The Commission under RC 4928.06 (A) ensures state policies are put into effect, including under RC 4928.02 (A) to provide reasonably priced retail electric service; (G) implement flexible regulation to recognize continually emerging competitive electricity

markets; and (N) facilitate Ohio's effectiveness in the global market. Approval of paragraph 3 to limit shopping opportunities to all but those part of government aggregation fails to meet those codified policy guidelines.

Indeed, paragraph 3 of the ESP Stipulation inconsistently effectuates state policy. Its language requires modification by the Commission before approval for all customers to avoid RSS charges upon agreeing to return at, and pay for, POLR services at market-based rates during 2011 and 2012.

Commission exercise of specialized knowledge and expertise should conclude a modified paragraph 3 consistently applies state policies, and benefit ratepayers and the public interest during 2011 and 2012. In 2013, shopping customers return at SSO rates depending on the program approved by the Commission.

Conclusion

Cargill requests modification of paragraph 3 to benefit ratepayers and in the public interest. It should read: "In 2011 and 2012, all customers who elect not to pay the RSS will return to DP&L at a market-based rate." Further, in 2013, all customers should return to POLR service at SSO rates unless the plan approved provides otherwise.

Respectfully submitted



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this Reply Brief was served this 10th day of April by electronic mail upon the persons listed below.


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