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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 Approval of Its Transmission Cost)
Recovery Rider.)

Case No. 09-256-EL-UNC

**MOTION TO STRIKE AND MEMORANDUM IN SUPPORT
OF INDUSTRIAL ENERGY USERS-OHIO**

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MOTION TO STRIKE OF INDUSTRIAL ENERGY USERS-OHIO

On September 23, 2009, the Dayton Power and Light Company ("DP&L") submitted a "Notice of Filing" in response to the Entry on Rehearing issued on September 9, 2009 by the Public Utilities Commission of Ohio ("Commission"). The Notice of Filing included a revised transmission cost recovery rider ("TCRR") and a new proposal to recover the costs associated with PJM's reliability pricing model ("RPM").

As discussed in the attached Memorandum in Support, Industrial Energy Users-Ohio ("IEU-Ohio") respectfully requests that the Commission expeditiously approve DP&L's revised TCRR but deny DP&L's request for approval of the PJM RPM Rider and strike that portion of DP&L's Notice of Filing inasmuch as the proposed PJM RPM Rider is procedurally defective and DP&L is already recovering the PJM RPM costs through its current rate plan.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 27, 2009, DP&L filed an Application for approval of a TCRR in this proceeding. On May 5, 2009, IEU-Ohio moved to intervene in this proceeding and objected to DP&L's proposed recovery of costs associated with PJM's RPM through the proposed TCRR. On May 15, 2009, DP&L amended its Application and also filed a reply to the objections of IEU-Ohio. On May 27, 2009, the Commission issued an Opinion and Order approving DP&L's Application ("Order"). On June 19, 2009, IEU-Ohio filed an Application for rehearing of the provisions of the Order that approved DP&L's recovery of RPM-related costs through the TCRR. On September 9, 2009, the Commission issued an Entry on Rehearing granting IEU-Ohio's request. The Commission directed DP&L to file revised tariffs to comply with the Entry on Rehearing within fourteen days ("Entry on Rehearing").

On September 23, 2009, DP&L submitted a "Notice of Filing" in this proceeding in response to the Commission's Entry on Rehearing ("Notice of Filing"). As discussed herein, the Notice of Filing included a revised TCRR as Exhibit A, which reflected RPM

costs and credits removed.¹ The Notice of Filing also contained a new PJM RPM Rider, attached as Exhibit B, through which DP&L proposes to recover all of the RPM-related costs that have been removed from the TCRR.²

IEU-Ohio does not object to DP&L's revised TCRR and requests that the Commission approve it expeditiously. However, for the reasons discussed herein, IEU-Ohio objects to DP&L's request for approval of the PJM RPM Rider and requests that the Commission strike that portion of DP&L's Notice of Filing.

II. ARGUMENT

A. The Commission Has Not Approved DP&L's Recovery of RPM Costs.

DP&L suggests in its Notice of Filing that the Commission has already approved the recovery of RPM-related costs through a rider. DP&L relies, in part, on a Commission Staff Review and Recommendation issued on May 21, 2009 in this proceeding in which the Commission Staff recommended that "the amended application be approved, on a service rendered basis, beginning on June 1, 2009."³ DP&L claims that based upon this course of events "all of the costs and credits reflected in the TCRR as initially approved, including PJM-imposed RPM costs and credits, have already been reviewed, verified and recommended for approval by the Commission Staff and approved by the Commission for recovery."⁴

¹ Notice of Filing at 3.

² *Id.*

³ *Id.* at 2.

⁴ *Id.*

While it is correct that the Commission's Order approved the recovery of RPM-related costs, those approvals were reversed by the Commission's subsequent Entry on Rehearing. On rehearing, the Commission explicitly found that RPM costs were not transmission-related and could not be recovered pursuant to Section 4928.05(A)(2), Revised Code:

In its memorandum contra IEU-Ohio's application for rehearing, DP&L states that the "RPM ensures that there is *adequate generation capacity* on a regional basis to meet demand . . . [emphasis added]" and that "RPM payments made to generators . . . help to ensure that *adequate generation will be built and maintained* . . . to meet customer demand [emphasis added]." These statements appear to be an explicit acknowledgement by DP&L that RPM payments are intended to pay for the construction and maintenance of generation capacity in PJM in order to meet customer demand. Although the generation capacity paid for by the RPM may ensure the reliability of the grid, upon further review, we agree with IEU-Ohio that this is not a sufficient basis to classify the RPM costs as a transmission or transmission-related cost. The only costs that may be recovered under a transmission rider authorized by Section 4928.05(A)(2), Revised Code, are costs which are transmission or transmission-related. Therefore, the RPM costs may not be recovered under the TCRR, which was filed pursuant to Section 4928.05(A)(2), Revised Code. **DP&L is directed to file within 14 days revised tariffs, which remove the RPM costs from the TCRR, for Commission review and approval.**⁵

The Commission did not direct DP&L to file compliance tariffs proposing recovery of RPM-related costs through a new rider in this proceeding. The Commission left open the possibility that DP&L could file a separate application to propose recovery of regional transmission organization ("RTO") related costs based upon a provision in the stipulation approved by the Commission in DP&L's electric security plan ("ESP") proceeding:

[T]he Commission notes that, although the RPM costs are not recoverable under the TCRR, the RPM costs **may be recoverable under DP&L's ESP**, which was approved by the Commission pursuant to Section 4928.143, Revised Code. In fact, the stipulation approved by the

⁵ Entry on Rehearing at 4-5 (emphasis added).

Commission in DP&L's ESP proceeding specifically provides that DP&L may apply to the Commission for a separate rider to recover RTO costs which are not recovered under the TCRR. *In re Dayton Power and Light Company*, Case No. 08-1094-EL-SSO, et al., Opinion and Order (June 24, 2009) at 6.⁶

DP&L characterizes its Notice of Filing as implementing a PJM RPM Rider pursuant to the Entry on Rehearing.⁷ From both a procedural and substantive standpoint, DP&L's proposed PJM RPM Rider is flawed and must be rejected by the Commission.

The Commission's Entry on Rehearing introduced the possibility that DP&L could seek recovery of RTO costs that are not recovered under the TCRR. However, the Commission specified that any such request for recovery of costs must be considered in the context of DP&L's ESP. As IEU-Ohio noted in its Application for Rehearing, among other problems, DP&L's proposed recovery of RPM-related costs distorts the statutorily required comparison of ESP versus market rate offer ("MRO") costs:

Allowing DP&L to recover RPM costs through the TCRR also unlawfully and unreasonably removes a generation-related component from the required evaluation of an ESP proposal. Section 4928.141, Revised Code, requires an electric distribution utility to offer an SSO, including a supply of firm generation service, pursuant to a market rate option ("MRO") or ESP. Section 4928.143(C)(1), Revised Code, only permits the Commission to approve an ESP if it finds that the ESP is "more favorable in the aggregate as compared to the expected results that would otherwise apply" under an MRO. Costs recovered through the TCRR are excluded from the required ESP versus MRO comparison. Thus, the Commission's decision sets a precedent by which the Commission excludes an important and significant generation cost from the required ESP versus MRO comparison.⁸ The Commission cannot exclude from the

⁶ *Id.* at 5 (emphasis added).

⁷ *Id.* at 1.

⁸ The Commission's decision shields RPM costs twice from the ESP versus MRO comparison in DP&L's pending ESP case. RPM costs, since they are imbedded in DP&L's current rates, are not subject to the ESP versus MRO test. See Section 4928.143(D), Revised Code. And, as noted above, TCRR costs are not considered in the ESP versus MRO evaluation.

ESP versus MRO comparison RPM costs or any other generation-related costs levied by a regional transmission organization inasmuch as doing so illegally distorts the required ESP versus MRO comparison (as utilized to satisfy Section 4928.141, Revised Code). Excluding RPM costs from the ESP versus MRO comparison by allowing DP&L to recover RPM costs through the TCRR will illegally tend to make the ESP artificially look more favorable than an MRO.⁹

The Commission's Entry on Rehearing did not address this and other arguments raised by IEU-Ohio in its Application for Rehearing, specifically finding that because RPM costs were not recoverable under Section 4928.05, Revised Code, which was the authority cited by DP&L in its original application, there was no need to address the merits of these arguments. IEU-Ohio could raise these or similar arguments when DP&L submitted a new application to propose recovery of RTO-related costs, and the Commission could address the merits of such arguments at that time.

DP&L's compliance filing, styled as a Notice of Filing, stems from DP&L's original application, submitted pursuant to Section 4928.05, Revised Code. It is procedurally improper for DP&L to propose recovery of a new PJM RPM Rider in its compliance filing. DP&L's opportunity to seek recovery of RPM-related costs must be considered in the context of its ESP. Therefore, DP&L must make an application seeking recovery of PJM RPM-related costs pursuant to Sections 4928.141 and 4928.143, Revised Code, and such an application is subject to the relevant Commission ESP rules. DP&L has failed to comply with the Commission's Entry on Rehearing. Accordingly, the Commission should strike that portion of DP&L's Notice of Filing that seeks approval of a new PJM RPM Rider.

B. The Commission Should Deny DP&L's Request to Implement a PJM RPM Rider.

⁹ Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 8-9.

Throughout this proceeding, DP&L has argued that recovery of RPM-related costs is necessary because it incurs RPM-related costs as a result of its PJM membership, and RPM payments to capacity resources help ensure the reliability of the grid.¹⁰ DP&L has also claimed that RPM-related costs are not being recovered through its rate plan, arguing that its rates were unbundled when Ohio implemented Amended Substitute Senate Bill 3 ("SB 3"). In fact, DP&L has gone so far as to assert that the generation rates reflected in its ESP proceeding, Case No. 08-1094-EL-SSO, *et al.*, are the same as the unbundled generation rates established in Case No. 99-1687-EL-ETP.¹¹ Neither argument has merit.

First, the facts clearly establish that the generation rates in DP&L's existing rate plan, as well as the generation rates reflected in the Stipulation and Recommendation approved by the Commission in Case No. 08-1094-EL-SSO, are not the same as the generation rates approved when DP&L's rates were unbundled in Case No. 99-1687-EL-ETP. Specifically, DP&L increased its generation rates by an amount equal to eleven percent of its January 1, 2004 generation rates through the addition of a Rate Stabilization Surcharge ("RSS") rider that became effective on January 1, 2006.¹² DP&L's ESP made further changes to the structure of DP&L's generation rates, such as the reintroduction of a fuel recovery rider. Thus, clearly the generation currently being

¹⁰ Reply Comments of the Dayton Power and Light Company to Comments of Industrial Energy Users-Ohio at 4-5.

¹¹ *Id.* at 5-6.

¹² *In the Matter of the Application of the Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (December 28, 2005).

recovered through DP&L's ESP rates have increased since its generation rates were unbundled in Case No. 99-1687-EL-ETP.¹³

Second, whether RPM-related costs are reliability related in some regard is completely irrelevant because DP&L is already fully recovering its costs, including RPM-related costs. Through both its 2003 rate stabilization plan ("RSP") and the 2005 case that extended the RSP through December 31, 2010, DP&L was and is required to provide a market-based standard service offer ("SSO") in accordance with Section 4928.14(A), Revised Code.¹⁴ Thus, DP&L's existing rate plan, as that term is defined in Section 4928.143(D), Revised Code, compensated DP&L through market-based rates for a firm supply of electric generation service.

To comply with Amended Substitute Senate Bill 221 ("SB 221"), DP&L, whose existing rate plan extended beyond December 31, 2008, proposed an ESP pursuant to Section 4928.143(D), Revised Code:

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be

¹³ *Id.* at 5-6.

¹⁴ *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Stipulation and Recommendation at 12 (May 28, 2003). See also *In the Matter of the Application of the Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Stipulation and Recommendation at 4 (November 3, 2005). In the RSP, DP&L argued that its SSO rates were market-based rates that fully complied with former Section 4928.14, Revised Code. The Commission agreed and its Order approving the RSP Stipulation and Recommendation explicitly stated "[t]he Commission finds that the procedure set forth in the proposed stipulation does provide consumers with market-based rates...." *Id.* at Opinion and Order at 26 (September 2, 2003).

subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.¹⁵

The Stipulation approved by the Commission in DP&L's ESP proceeding provides that DP&L's existing rate plan is extended through December 31, 2012 except as expressly modified by the Stipulation.¹⁶ Thus, DP&L continues to be responsible for providing all of the components of generation supply necessary to provide firm generation service to its retail customers, and is being compensated under market-based rates for these services.

Because DP&L is receiving market-based compensation for generation service, it is difficult to identify which components of costs DP&L may or may not be recovering through rates. Nonetheless, in recent proceedings involving DP&L, the Commission Staff has taken the position that the fact that DP&L has been earning more than its most recently authorized rate of return provides conclusive evidence that DP&L is fully recovering all of its costs. DP&L's most recent FERC Form 1 report indicates that it earned a return on equity of 20.2% in calendar year 2008. Thus, financial indicators suggest that DP&L is fully recovering its costs, including all RPM-related costs.

¹⁵ Section 4928.141(A), Revised Code, also requires a standard service offer ("SSO") to include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."

¹⁶ *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case No. 08-1094-EL-SSO *et al.*, Stipulation and Recommendation at 3 (February 24, 2009).

However, it is not necessary for the Commission to conduct an extensive inquiry into DP&L's financial affairs in order to address whether RTO-related costs are already being recovered under DP&L's current rate plan because DP&L has directly answered the question. In support of the Stipulation and Recommendation in DP&L's ESP proceeding, DP&L submitted testimony from Dona R. Seger-Lawson, who addressed this question and indicated that the only significant cost not being recovered under its existing rate plan was fuel:

Q: Can you explain whether DP&L is authorized to recover or defer fuel costs under Section 4928.143(D)?

A: Yes. As explained above, Ohio Rev. Code § 4928.143(D) applies to DP&L. Section 10 4928.143(D) permits DP&L to recover or defer costs incurred in 2009-2010 that are not being recovered under DP&L's existing rate plan and that are incurred to comply with Section 4928.141. At the time SB 221 was enacted, and still today, the only significant cost that falls within that description was fuel. This portion of Section 14 4928.143(D) thus appears to have been enacted to permit DP&L to recover or defer fuel costs.¹⁷

Thus, based upon DP&L's own testimony, under its existing rate plan the only cost DP&L is not recovering that it incurs to comply with Section 4928.141, Revised Code, is fuel.

Finally, DP&L has presented no evidence in this proceeding to support its claims that RPM costs are not being recovered through its existing rate plan. DP&L bears the burden of proof in this regard, and in the absence of such proof, the Commission cannot approve the proposed PJM RPM rider.

¹⁷ *Id.* at Testimony of Dona R. Seger-Lawson in Support of the Stipulation and Recommendation at 5 (February 24, 2009).

C. The Commission Should Promptly Approve DP&L's Revised TCRR.

It appears that DP&L has complied with the Commission's directive to remove all RPM-related costs from its TCRR. Because customers are presently paying higher TCRR rates that reflect the inclusion of RPM-related costs, IEU-Ohio urges the Commission to promptly approve the revised TCRR.

III. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully requests that the Commission promptly approve DP&L's revised TCRR but strike the PJM RPM Rider from DP&L's Notice of Filing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Strike and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 30th day of September, 2009, via first class mail, postage prepaid.


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