BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Market Rate Offer.	)))	Case No. 12-426-EL-SSO
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)))	Case No. 12-427-EL-ATA
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	))))	Case No. 12-428-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for the Waiver of Certain Commission Rules.	)))	Case No. 12-429-EL-WVR
In the Matter of the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)))	Case No. 12-672-EL-RDR

INITIAL BRIEF OF THE OHIO HOSPITAL ASSOCIATION

This matter began on March 30, 2012, when Dayton Power & Light Company ("DP&L" or the "Company") filed its application to meet its standard service offer ("SSO") pursuant to Ohio Revised Code Section ("R.C.") 4928.141. At that time, DP&L sought approval of a market rate offer ("MRO") plan pursuant R.C. 4928.142. DP&L withdrew its MRO plan on September, 7, 2013 and on October 5, 2013 it filed an electric security plan ("ESP") in place of its MRO filing. DP&L subsequently amended its ESP application with revisions on December 12, 2013. This final, amended plan was the subject of hearings held at the offices of the Public Utilities Commission of Ohio ("PUCO" or "Commission") between March 18, 2013 and April 3, 2013.

Pursuant to the direction of the Attorney Examiners assigned to this case, the Ohio Hospital Association now submits its Initial Brief.

I. EXECUTIVE SUMMARY

DP&L's request for a switching tracker and a Service Stability Rider ("SSR") both should be rejected by the Commission. While R.C. 4928.143 gives the Commission considerable discretion in approving the various rate elements that can comprise an ESP, the Commission must not ignore the clear policy of this state in favor of market-determined outcomes for the pricing of electric generation services along with the interests of the consumers of those services within DP&L's service territory. DP&L's application in this case seeks near-perfect insulation from the downside risks of the marketplace and competitive shopping for the Company, essentially putting DP&L in a financial position that is "no-worse-than" traditional rate base rate of return regulation as it stood prior to SB 3. As proposed by DP&L, this extraordinary transfer of downside financial risk from the Company to its customers is unjust, unreasonable, and should be rejected by the Commission.

II. THE OHA

OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States and is the only Ohio trade association representing hospitals with 167 private, state and federal government hospitals and more than 19 health systems among its membership. OHA's mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. A significant amount of that expenditure is for service provided by DP&L to the approximately 21 hospitals in its service area. Every hospital, or virtually every hospital, in DP&L's service area is a member of OHA and all OHA member hospitals are posted at www.ohanet.org/about_oha/member_list.asp.

A significant component of a hospital's costs is electric energy, estimated at about $4500 per staffed bed per annum, and such costs are necessarily passed on to patients, their families, businesses and taxpayers. Additionally, hospital have somewhat unique electricity load patterns and require reliable electric service on a 24-hour basis very day of the year in order to provide medical care. All hospitals are required by federal regulators and accrediting organization to maintain emergency generators in the event of interrupted utility power, and larger hospitals in particular utilize sophisticated energy management systems and related energy efficiency technology. In sum, communities and individuals depend upon hospitals, hospitals in turn depend upon electric companies to provide reliable service at an affordable rate, and hospitals and DP&L have a common interest in matters related to energy efficiency and demand management.

III. BACKGROUND

DP&L's prior (and first) Electric Security Plan, approved by the Commission in Case No. 08-1094-EL-SSO on June 24, 2009[1], was itself a continuation of DP&L's rate stabilization plan that had been established in September, 2003[2], and subsequently modified in 2005[3]. The 2009 ESP carried an expiration date of December 31, 2012. June 24, 2009 O&O at p. 4. The June 24, 2009 O&O also approved the continuation of the rate stabilization surcharge ("RSC")[4] that had

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[1] Dayton Power & Light Company, Case No. 08-1094-EL-SSO, et al., (Opinion & Order dated June 24, 2009) ("June 24, 2009 O&O").

[2] Dayton Power & Light Company, Case No. 02-2779-EL-ATA, (Opinion & Order dated September 2, 2003).

[3] Dayton Power & Light Company, Case No. 05-276-EL-AIR, (Opinion & Order dated December 28, 2005) ("RSC Order").

[4] This charge was first designated as a rate stabilization surcharge, or "RSS", but common usage apparently morphed its name into the rate stabilization ("charge" or "RCS.") Compare, RSP case with June 24, 2009 O&O at p. 3.

been created in the 2003 rate stability plan and implemented in Case No. 05-276-EL-AIR (and intended to operate through 2010). The RSP Case, the Commission approved the collection of $76, 250,127 by DP&L from all ratepayers through a non-bypassable rider mechanism on distribution billings. This amount was derived by calculating 11% of DP&L's then-current generation revenues using January 1, 2004 rates. RSC Order, p. 11. As the RSC was unaltered by the Stipulation approved in the September 24, 2009, O&O, an approximately $73 million payment remains embedded in DP&L's rates.[5]

In its initial filing in the instant case on March 30, 2012, DP&L's MRO plan sought to continue the RSC unchanged from the prior proceedings. Application, March 30, 2012, Book III, Testimony of Dona R. Seger-Lawson, p. 11.

Barely a month after the issuance of the Commission's order in the Columbus Southern Power Company and Ohio Power Company ESP[6], DP&L moved to withdraw its MRO filing on September 7, 2012, and filed its ESP roughly a month thereafter. However, by this time, the relatively modest $76 million ESC, had changed into a $120 million SSR, to "maintain [DP&L's) financial integrity and to have the opportunity to earn a reasonable rate of return." October 5, 2012, Application, Testimony of Craig L. Jackson, p. 3. The switching tracker also made its first appearance in the October 5, 2012 ESP. *Id.* The switching tracker is designed to capture and defer for later recovery (with carrying charges) the difference between the blended SSO rate and the competitive bid ("CB") rate in effect for a tariff class, times the quantity of switched load after August 30, 2012. DP&L Ex. 1, p 11, DP&L Ex. 9, pp. 16-17. Finally,

[5] Although the ESP as approved by the Commission in the June 24, 2009 O&O specifically called for the termination of the RSC on December 31, 2012, the Commission granted DP&L motion to continue the ESP beyond that date, including the RSC. For reasons discussed hereinafter, the continuation of the RSC should weigh in the Commission's determination of the outcome of the instant case. Revenues produced by the RSC have eroded over time to the $73 million level. Tr. Vol. V., p. 1277.

[6] Columbus Southern Power Company and Ohio Power Company Electric Security Plan Proceeding, Case No. 11-346-EL-SSO, et al. (Opinion and Order dated August 8, 2012).

through its Second Revised Application, filed December 12, 2012, as presently before the Commission for consideration, the SSR increased to recover $137.5 million annually for the five year term of this ESP in order to maintain the financial integrity of the Company. Tr. Vol. I. p. 139.

IV. ARGUMENT

There is no indication in the Commission's Opinion & Order in Case No. 11-346-EL-SSO that signals a return to traditional regulation, yet DP&L appears to read it in this manner. Much of the record developed in this case is substantially similar to that of a fully-regulated rate proceeding. Indeed, DP&L's proposal is designed to produce revenues designed to achieve targeted "fair" returns on equity, just like a case filed pursuant to R.C. 4909. See, e.g., *Id.* The Commission must not ignore the fact that these traditional ratemaking considerations were nowhere to be found in the discussions that led to the original establishment of the RSC, when it was the ratepayers, not the company that required "protection" from the marketplace. It is indeed ironic that in the 2003-2005 timeframe, it was an accepted assumption that no viable retail marketplace even existed. Now, the problem for DP&L appears to be that the marketplace works too well.

As indicated above, the OHA is only taking issue with two facets of the Company's proposal: the switching tracker and the SSR. The OHA does not challenge the balance of DP&L's application.

A. Switching Tracker

The Commission should adopt the position of Staff Witness Choueiki with respect to the switching tracker. Mr. Choueiki takes the position that the concept of a switching tracker is anti-competitive, and violates the spirit of several of the state policy goals set forth in R.C. 4928.02.

Staff Ex. 10, p 9. The OHA supports this view of the switching tracker for the reasons argued below. However, the OHA believes that these same considerations should also be applied to the SSR. Mr. Choueiki's rational for opposing the switching tracker, while at the same time supporting the concept of the SSR is troublesome. Mr. Choueiki is comfortable distinguishing between the SSR and switching tracker because the SSR is tied, not only to competitive generation service, but to transmission, distribution <u>and</u> generation. Tr. Vol. VII, p. 1865. Yet the record is clear that only DP&L's generation business is responsible for downward pressure on earnings such that the SSR is necessary in the opinion of the company. See, Tr. Vol. I, pp. 117-118.

B. SSR

The SSR is at odds with specific provisions of R.C. 4928.02, while nothing in that section or elsewhere in R.C. 4928 speaks to setting rates for competitive retail services according to rate of return concepts. Yet the voluminous record in this case in the main deals with the amount of revenue DP&L requires in order to achieve a specific rate of return for its *competitive* assets. And while R.C. 4928.02 provides "guidelines for the commission to weigh" [*In Re Application of Columbus Southern Power*, 2011 Ohio LEXIS 957, p. 9 (April 19, 2011)], there is nothing in those state policy provisions that even remotely speak to replicating the financial safeguards that Ohio law and regulation was designed to replace with market forces. Further, even if R.C. 4928.02 be only a "guide" to the Commission, the General Assembly intended it to be a very forceful guide. R.C. 4928.06 directly amplifies these policies:

> (A) Beginning on the starting date of competitive retail electric service, the public utilities commission <u>shall</u> ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.

The SSR runs counter to at least the following provision in R.C. 4928.02:

> It is the policy of this state to do the following throughout this state:
>
> (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

There is nothing in the record of this case to indicate that the SSR is necessary to ensure the availability of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. As the SSR has no relationship to the price of retail electric service whatsoever, other than to ensure a "regulated" rate of return to DP&L. But it has been clearly established that only DP&L's generation facilities are subject to any sort of financial stress. This begs the question: Is it of lawful concern to the Commission if DP&L cannot itself (using its own generation assets) provide default generation services in an economical manner, now over seven years after the initial establishment of the RSC? At a minimum, it is not a reason to negate the cost benefits of shopping for DP&L's customers.

> (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

There can be no question that the SSR is contradictory to this tenant of the state policy. As will be argued more forcefully by other parties to this case, the SSR is a subsidy to DP&L, whose affiliate, DPLR, markets the same fleet of generating facilities. This is clearly an un-level playing field and an impediment to healthy competition.

> (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

Any non-bypassable charge, is, by design, and exercise of market power—monopoly power to be specific. The use of monopoly power to subsidize a competitive retail service must be viewed as a particularly egregious offense to this state policy.

As far as the remaining provisions of R.C. 4928.02 are concerned, there is nothing to suggest that the support of the incumbent utilities generation fleet is among the policy directives.

R.C. 4928.06(B) underscores the inconsistency of the SSR with the policies of this state by providing the Commission by making the proper remedy available to DP&L, if the company's financial projections and harms come to pass:

> (B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

If there was some identified major structural defect in the competitive marketplace in the DP&L service territory, this statutory provision would enable the Commission to take corrective measures, vis-à-vis a non-bypassable surcharge to correct that market flaw. But DP&L's supposed financial problems stems from the *success* of the competitive marketplace for generation services, not any decline or loss of effective competition. The SSR simply deprives the distribution service customers of the opportunity to enjoy the benefits of competition while insulating one of the competitors for generation services from market pressures. There is no conceivable benefit to competition itself.

The question of whether the revised code allows the Commission to grant such a "support" payment such as the SSR will likely be decided by the Ohio Supreme Court. But it is far from certain at this point that the Commission has the authority.

The Ohio Supreme Court has already made clear that the Commission does not have unlimited discretion in approving or shaping an ESP. The Commission is limited to the enumerated list of items in this subjection of R.C. 4928.143 when considering the features of an ESP, beyond the bare price of the default generation service itself. *In Re Application of Columbus Southern Power, et al.*, 2011 Ohio LEXIS 957, p.6. For the purposes of this discussion, the relevant focus is on R. C. 4928.143(B)(2)(d), as no other provision of R.C. 4928.143 touches on a support mechanism like the SSR. This subparagraph of the Revised Code provides as follows:

> (2) The plan may provide for or include, without limitation, any of the following:
> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

So to parse this subparagraph, the SSR is a non-bypassable charge on distribution services, so it does not relate to a limitation on customer shopping, although it does reduce its value. It may be non-bypassable, but whether or not it is non-bypassable does not alter the fact that the charge itself is simply a financial support mechanism for DP&L, its non-bypassability is really of only secondary importance. The SSR has no relationship to standby, back-up, or supplemental power service. It is clearly not relevant to the provision of default service because DP&L has elected to forgo FRR status with PJM, and so relies on the residual base auction process within PJM's RPM process for default service capacity. The SSR does not represent carrying costs, it is not an amortization of anything, and it is not an accounting deferral. Finally, there is no evidence in the record to suggest that it is necessary to stabilize or provide certainty regarding retail electric service, except maybe a level of certainty regarding the return on equity for DP&L. It does not seem reasonable to think that this is the certainty that the General Assembly had in mind when it crafted this provision of the Revised Code.

Simply put, this subparagraph of R.C. 4928.143 does not appear to even remotely provide for the SSR. Accordingly, it is very difficult to envision how this charge will stand up to scrutiny upon review.

V. CONCLUSION

The OHA and its member hospitals served by DP&L have a strong interest in a financially healthy distribution and transmission utility. For this reason, the OHA would support an SSR designed to continue to collect the approximate level of revenues in the current RSC, said to be $73 million per year, over the life of this ESP.

It simply strains credulity to believe that between March and October of 2012, circumstances changed in the regional electric marketplace to cause the financial cataclysm that DP&L claims it now faces. We can all agree that the growth in shopping in the DP&L service territory would have the effect of eliminating the Company from the ranks of the most profitable electric utilities in the nation, but this is a positive outcome, not a negative one. This is what market forces are supposed to do. The far more plausible explanation of this case is that DP&L reviewed the apparent return to embedded cost regulation that the Commission provided to AEP Ohio, and decided that managerial prudence required nothing less of it than to seek similar treatment from the Commission. So in order to filter out the impact of that decision, it is reasonable to revert back to the support sought by DP&L prior to the Commission's August 8, 2012 decision in the Case No. 11-346-EL-SSO. Because it remains unclear whether this support is justified at all, this is a more than fair outcome for DP&L.

Respectfully submitted on behalf of
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Intervene was served upon the parties of record listed below this 20th day of May 2013 *via* electronic mail.

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