FILE

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 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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

[PUBLIC – REDACTED VERSION]

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October 31, 2013 **Attorneys for Industrial Energy Users-Ohio**

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I. INTRODUCTION

On September 4, 2013, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("ESP II Order") modifying and approving the Dayton Power and Light Company's ("DP&L") Amended Application to Establish a Standard Service Offer in the Form of an Electric Security Plan ("Modified ESP"), including the Service Stability Rider ("SSR") and SSR-Extension ("SSR-E"). On September 6, 2013, the Commission issued an Entry Nunc Pro Tunc ("September 6th Entry"), which

extended the SSR, continued the SSR-E, and extended the duration of the Modified ESP.

Eight parties submitted applications for rehearing of the ESP II Order and September 6th Entry (collectively, "ESP II Orders").[1] The applications for rehearing demonstrate that the Modified ESP is quantitatively not more favorable in the aggregate as compared to the results that would otherwise apply under R.C. 4928.142 as required by R.C. 4928.143(C)(1) ("the ESP versus MRO test") by at least $313.8 million.

The applications for rehearing also identify that the September 6th Entry added an additional $64 million to the cost of the ESP without explaining whether the ESP is more favorable than a Market Rate Offer ("MRO"). In recognition of this fundamental error, DP&L's Application for Rehearing asks that the Commission hold "qualitative" benefits of the Modified ESP outweigh the $313.8 million that the Modified ESP is less favorable than the MRO. As discussed below and as shown in the applications for rehearing filed by the customers of DP&L and FES, however, neither the Modified ESP approved in the ESP II Order nor the September 6th Entry passes the ESP versus MRO test. Accordingly, the Commission must reject the Modified ESP or reduce the cost of the Modified ESP to bring it into compliance with Ohio law.

The applications for rehearing filed by intervenors identify that the ESP II Order unlawfully and unreasonably authorized DP&L to collect untimely transition revenue or equivalent revenue through the SSR to subsidize DP&L's competitive lines of business

[1] Applications for Rehearing were filed by the Dayton Power and Light Company ("DP&L"), Industrial Energy Users-Ohio ("IEU-Ohio"), FirstEnergy Solutions Corp. ("FES"), Office of the Ohio Consumers' Counsel ("OCC"), Ohio Energy Group ("OEG"), Kroger Company ("Kroger"), Ohio Hospital Association ("OHA"), and Ohio Partners for Affordable Energy ("OPAE").

long after Ohio law requires electric distribution utilities ("EDU") to stand on their own in a competitive market.

DP&L's Application for Rehearing and the multiple applications for rehearing submitted by intervenors also show that the Commission's approval of the SSR and SSR-E do not comply with the requirements of R.C. 4928.143(B)(2)(d). DP&L's Application for Rehearing, however, urges the Commission to continue to ignore Ohio law so as to remove the conditions it placed on the SSR-E and to remove the cap on nonbypassable compensation that may be available to DP&L's competitive generation business.

In any case, the Commission does not need to address DP&L's request to remove the conditions and cap on the SSR-E. As shown in IEU-Ohio's Application for Rehearing, the SSR and SSR-E are unlawful. If the Commission nonetheless permits DP&L to bill and collect the SSR and SSR-E, it should reject DP&L's request to remove the conditions and cap contained in the ESP II Order.

If the Commission does not reject the SSR on rehearing, IEU-Ohio further urges the Commission to reject OCC's request that DP&L allocate SSR revenue responsibility based upon kilowatt hour ("kWh") usage. IEU-Ohio agrees with OCC that the SSR is unlawful and unreasonable, but IEU-Ohio disagrees with OCC's request to blindly and disproportionately shift the burden associated with the SSR increase to other customers.

II. ARGUMENT

A. The Commission should reject DP&L's assignment of error that alleges the Commission should "clarify" that the Modified ESP as further modified by the September 6th Entry is more favorable in the aggregate as compared to the results that would otherwise apply under R.C. 4928.142

In its second assignment of error, DP&L seeks "clarification" of the Commission's "decision regarding why DP&L's ESP is more favorable in the aggregate than an MRO."[2] Because the assignment of error seeks relief that is neither factually nor legally justified, the Commission should deny DP&L's request to clarify the September 6th Entry.

In support of the second assignment of error, DP&L states that the Commission failed to determine that the ESP is more favorable in the aggregate than an MRO ("ESP versus MRO test") in the September 6th Entry.[3] According to DP&L, the September 6th Entry increases the amount that the Modified ESP fails the ESP versus MRO test by $63.8 million, but the September 6th Entry does not explain whether the qualitative benefits of the ESP still exceed the increased amount that the ESP fails the statutory test.[4] DP&L then requests that the Commission bring its decision into compliance with Ohio law by making clear that the ESP is quantitatively worse than an MRO by $313.8 million, but that the qualitative benefits exceed the relative quantitative harm caused by the Modified ESP.[5]

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[2] DP&L Application for Rehearing at 2 (Oct. 4, 2013).

[3] *Id.* at 6-8.

[4] *Id.* at 7.

[5] *Id.* at 7-8.

DP&L is correct that the Commission in the September 6th Entry increased the SSR and SSR-E charges by $63.8 million, but has understated the additional negative consumer impact of the September 6th Entry.[6] The September 6th Entry also slowed the move to an auction-based Standard Service Offer ("SSO"). Because the auction-based effects on the SSO have been slowed, the net increase in the quantitative cost of the Modified ESP relative to an MRO is likely greater than the $63.8 million associated with the extensions of the SSR and SSR-E because results of the auction process that are blended with legacy ESP prices are assumed to improve the price of the Modified ESP throughout the ESP term.[7] A slower implementation of the competitive bidding process ("CBP") will mathematically increase the cost of the ESP relative to a faster move, all other things being equal.[8] The Commission need not grant DP&L's assignment of error because on an objective basis the Modified ESP already fails the ESP versus MRO test by at least $250 million, as shown by the Commission's ESP II Order.[9] If the Commission does grant rehearing of DP&L's assignment of error, however, the Commission should state that the Modified ESP as further modified by the September 6th Entry is at least $313.8 million worse than an MRO and should further identify the additional cost of the Modified ESP that results from the delay in the implementation of an auction-based SSO.

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[6] September 6th Entry at 2.

[7] *See, e.g.,* DP&L Ex. 5 at RJM-1.

[8] The results of DP&L's recent CBP confirm that the slower move to market increases the cost of the ESP by extending the duration that DP&L may continue to collect above-market SSO rates. DP&L's current SSO generation service price is $76.62 per megawatt hour. DP&L Ex. 5 at RJM-1. Winning bidders committed to supply SSO generation service at $49.32 megawatt hour. *In the Matter of the Procurement of Standard Service Offer Generation as Part of the Electric Security Plan for Customers of The Dayton Power and Light Company*, Case No. 13-2120-EL-UNC, Finding and Order at 2 (Oct. 30, 2013).

[9] ESP II Order at 50.

The Modified ESP also eliminates an option currently available to customers returning to the ESP from government aggregation programs to avoid the SSR. Under the existing ESP, customers of governmental aggregation can elect to avoid the nonbypassable Rate Stability Charge ("RSC") if they agree to return to SSO service at market-based rates.[10] Under the Modified ESP, governmental aggregation customers no longer have that option.

Additionally, neither the ESP II Order nor the September 6th Entry addresses the effect of the SSR on governmental aggregation as required by R.C. 4928.20(K).[11] The failure to make the statutory review required by this Section was plainly an error.

The failure to provide government aggregation customers relief from the SSR also represents a cost of the ESP that is not reflected in the ESP versus MRO test. Government aggregation customers currently can avoid the cost of the RSC under the previously approved ESP. The ESP II Orders fail to address this cost and [redacted] [12] Government aggregation customers, however, now face a higher cost if they choose to return to an ESP that is at least $313.8 million less favorable in the aggregate than an MRO. DP&L failed to address this cost of its Modified ESP. Thus, the Commission has improperly approved an ESP that not only fails the ESP versus MRO test, but has also failed to account for an additional quantitative cost because the Commission did not address and approve the

[10] *In the Matter of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation at 4 (Feb. 24, 2009).

[11] R.C. 4928.20(K) provides in relevant part, "within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan."

[12] Tr. Vol. XI at 2838-39.

continuation of the option permitting governmental aggregation customers to return to the SSO at a market price to avoid generation related nonbypassable charges such as the SSR.

Although DP&L is correct that rehearing should be granted to recognize the total quantitative amount that the ESP fails the ESP versus MRO test, a grant of rehearing should not also result in approval of the Modified ESP as further amended by the September 6th Entry. As explained in the Application for Rehearing filed by IEU-Ohio, the Commission does not have the authority to approve an ESP that is quantitatively worse in the aggregate than an MRO. Based on the finding that the Modified ESP is at least $313.8 million worse than an MRO for customers (by DP&L's understated estimate), the ESP does not pass the ESP versus MRO test. Further, the record does not support a finding that the Modified ESP has any qualitative benefits that outweigh the millions of dollars that the Modified ESP fails the ESP versus MRO test even if the Commission could inject "qualitative" factors into the ESP versus MRO test.[13]

B. The Commission should reject DP&L's request to remove the cap and conditions on the SSR-E because R.C. 4928.143(B)(2)(d) does not authorize the Commission to approve the SSR or SSR-E

DP&L projected that its generation business will not receive sufficient wholesale energy and capacity revenue to stand on its own in the competitive market during the

[13] IEU-Ohio Application for Rehearing at 9-26. With regard to the competitive enhancements the Commission finds are an important qualitative benefit, DPL agrees that there is no evidence to support a finding of a benefit in excess of the costs. In its Application for Rehearing, DP&L states, "[A]lthough numerous CRES intervenor witnesses asked the Commission to order DP&L to implement a variety of competitive enhancements, none of those witnesses included any analysis of either the benefits or the costs of their proposals. [Citations omitted.] Indeed, they repeatedly admitted that they did not conduct any cost/benefit analysis." DP&L Application for Rehearing at 11. As noted in IEU-Ohio's Application for Rehearing, the Commission's conclusion that the competitive enhancements provide any benefit to customers that warrants disregarding the substantial cost of the Modified ESP is unsupported by the record, a violation of R.C. 4903.09. IEU-Ohio Application for Rehearing at 23.

ESP period.[14] In reliance on those representations, the ESP II Orders authorized DP&L to establish the SSR.[15] The ESP II Orders also authorized DP&L to request authority to extend the SSR if certain conditions are satisfied.[16]

DP&L states that R.C. 4928.143(B)(2)(d) does not authorize the Commission to condition the SSR-E.[17] According to DP&L, "the conditions to grant a stability charge under that section are that: (1) the stability charge is a charge; (2) the stability charge is related to one of the items listed in the statute; (3) the stability charge would promote stable and reliable service." DP&L claims that "[t]here is nothing in § 4928.143(B)(2)(d) that authorizes the Commission to add to the statute, or to impose additional conditions that are not contained in that section."[18] Thus, DP&L claims that the Commission unlawfully attempted to rewrite R.C. 4928.143(B)(2)(d).

IEU-Ohio agrees that the Commission did not comply with R.C. 4928.143(B)(2)(d) when it approved the SSR and SSR-E, but not for the reason stated by DP&L in its Application for Rehearing. According to DP&L, the Commission cannot under R.C. 4928.143(B)(2)(d) limit the amount and condition the authorization of the SSR-E. The Commission, however, may modify an application to establish an SSO.[19]

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[14] DP&L Ex. 1 at 13.

[15] ESP II Order at 17, 21-22, 25.

[16] ESP II Order at 26-28; September 6th Entry at 2.

[17] DP&L Application for Rehearing at 3.

[18] *Id.*

[19] R.C. 4928.143(C)(1)("the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.")

Certainly, the Commission has the authority to condition a lawful charge so as to render it reasonable as a term of the ESP.[20]

As identified in the applications for rehearing submitted by IEU-Ohio, OCC, Kroger, FES, and OHA, however, R.C. 4928.143(B)(2)(d) does not authorize the Commission to approve an SSR or SSR-E.[21] Approving such a nonbypassable charge would violate several Sections of R.C. Chapter 4928, which prohibit the untimely collection of transition revenue, anticompetitive subsidies, and require an EDU to comply with corporate separation requirements.[22] Thus, the real issue presented by DP&L's assignment of error is its unwarranted assumption that the Commission can approve an SSR or SSR-E.

As IEU-Ohio showed in its Application for Rehearing, the Commission may authorize provisions only as provided by R.C. 4928.143(B)(1) and (2). The ESP must contain provisions "relating to the supply and pricing of electric generation service."[23] It may contain other provisions set out in R.C. 4928.143(B)(2), but "if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[24] DP&L has the burden of proof to establish the right to a charge in an ESP.[25]

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[20] The Commission is to effectuate the policies of R.C. 4928.02. R.C. 4928.06. It is the policy of the State to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." R.C. 4928.02(A).

[21] IEU-Ohio Application for Rehearing at 45-52.

[22] IEU-Ohio Application for Rehearing at 30-45.

[23] R.C. 4928.143(B)(1).

[24] *In re Application of Columbus Southern Power v. Pub. Util. Comm'n*, 128 Ohio St.3d 512, 520 (2011).

[25] R.C. 4928.143(C)(1).

The Commission's authority to authorize a nonbypassable charge is limited to those charges authorized under R.C. 4928.143(B)(2) (b) and (c), *i.e.* charges related to post-2009 construction and construction work in progress.[26] Because these subdivisions define particular instances in which a nonbypassable charge may be authorized, by implication other subdivisions do not.[27] Thus, the General Assembly did not provide the Commission with authority to approve a nonbypassable rider under R.C. 4928.143(B)(2)(d).[28]

Even if R.C. 4928.143(B)(2)(d) provided such authority, the Federal Power Act ("FPA") preempts the Commission from taking action to increase DP&L's wholesale energy and capacity compensation.[29]

Further, DP&L failed to demonstrate and the Commission did not find that the SSR or SSR-E has the effect of providing stability or certainty in the provision of retail electric service.[30]

Thus, if the Commission correctly applies the law and abrogates its authorization of the SSR and SSR-E, the Commission should deny DP&L's request for rehearing because its assignment of error is moot. For each of the foregoing reasons, the

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[26] The Commission's authority to approve a charge under these subdivisions has been cast into doubt by two Federal District Court cases that enjoined the Maryland and New Jersey commissions from increasing the wholesale capacity compensation paid to generation resources.

[27] *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm'n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

[28] *Id.*

[29] *PPL Energyplus, LLC, et al., v. Douglas R. M. Nazarian, et al.*, Civ. Action No. MJG-12-1286 (decided Sept. 30, 2013). *See also PPL Energyplus, LLC, et al., v. Robert M. Hanna*, Civ. Action No. 11-745 (decided Oct. 11, 2013). *See* IEU-Ohio Application for Rehearing at 27-30.

[30] IEU-Ohio Application for Rehearing at 47-52; ESP II Order at 22.

Commission should reject DP&L's request to rewrite R.C. 4928.143(B)(2)(d) as to allow DP&L to impose above-market charges on customers through the SSR.

While IEU-Ohio and OCC agree that the SSR is unlawful and unreasonable, OCC challenges the manner the ESP II Order allocated SSR revenue responsibility. During the hearing, OCC proposed to shift revenue responsibility for the SSR to larger customers by allocating the SSR on a kWh basis.[31] The ESP II Order rejected OCC's proposal and determined that "SSR revenues should be allocated using a 1CP demand allocation method that reflects the underlying character of the SSR charges."[32]

In its Application for Rehearing, OCC again claims that it is inappropriate to allocate SSR charges based upon demand because no party "performe[d] a revenue allocation [or] bill impact analysis."[33] Thus, OCC argues that "[a]ny 'financial integrity' charge should be allocated and collected on a per-kWh basis."[34] The Commission should reject OCC's argument because it, too, failed to submit a bill impact analysis of its proposal to allocate the SSR based upon kWh usage.[35] Thus, by its own reasoning, the Commission should reject OCC's proposal.

Further, if the Commission correctly abrogates the authorization of the SSR and SSR-E, the Commission has no reason to engage in a meaningless act of allocating revenue responsibility for a non-existent charge. Thus, the Commission can dismiss the assignment of error because it would be rendered moot.

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[31] Tr. Vol. VII at 1691.

[32] ESP II Order at 26.

[33] OCC Application for Rehearing at 55.

[34] *Id.*

[35] Tr. Vol. VII at 1691 (Q: And you have performed no analysis of the impact of your proposed allocation on any individual customer taking service under GS secondary, GS primary, GS primary substation, or GS high voltage, correct? A. That is correct for individual customers.); *see also* Tr. Vol. VII at 1690.

III. CONCLUSION

For the reasons stated herein, IEU-Ohio respectfully requests that the Commission grant its Application for Rehearing and reject DP&L's assignment of error seeking a finding that the Modified ESP passes the ESP versus MRO test. Further, it should reject the assignments of error by DP&L seeking to remove conditions on the unlawful SSR-E and by OCC seeking to impose an unsupported allocation of revenue responsibility. Each of these assignments of error assumes that the Commission can lawfully authorize the SSR and SSR-E. Because the riders cannot be lawfully authorized, the Commission can dismiss the assignments of error by abrogating authorization of the unlawful riders. Further, neither party has advanced a basis for the Commission to grant the requested relief.

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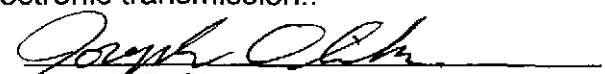
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Applications for Rehearing* was served upon the following parties of record this 31st day of October 2013, *via* electronic transmission..



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