

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MOTION TO INTERVENE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene in this case affecting the interests of customers of Dayton Power & Light Company ("DP&L" or "Utility") in the generating assets used to provide them with service. On December 30, 2011, DP&L filed an application "to transfer or sell its generation assets." But DP&L's application does not propose such transfer or sale through this filing even though it was required to,<sup>1</sup> and agreed to file such plan by December 31, 2013. Instead, DP&L has asked for waivers of PUCO Rules, including waiver of the requirement for a hearing (Ohio Admin. Code 4901:1-37-09(D)) and waiver (or postponement) of the requirement to state the fair market value of DP&L's assets to be sold or transferred (Ohio Admin. Code 4901:1-37-09(C)(4)).

The reasons the PUCO should grant OCC's Motion to Intervene are further set forth in the attached Memorandum in Support.

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<sup>1</sup> *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-0426-EL-SSO et al., Opinion and Order of September 4, 2013 at 27-28 and *Entry Nunc Pro Tunc* of September 6, 2013.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

*/s/ Edmund "Tad" Berger*

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Edmund Berger, Counsel of Record  
Assistant Consumers' Counsel  
Maureen Grady  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: (Berger) (614) 466-1292  
Telephone: (Grady) (614) 466-9567  
[Edmund.berger@occ.ohio.gov](mailto:Edmund.berger@occ.ohio.gov)  
[Maureen.grady@occ.ohio.gov](mailto:Maureen.grady@occ.ohio.gov)

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Through its Opinion and Order of September 4, 2013 and its Entry *Nunc Pro Tunc* of September 6, 2013, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) ordered DP&L to file an application to divest its generation assets by December 31, 2013 and to divest its generation assets by May 31, 2017.<sup>2</sup> DP&L has made an initial filing which it calls an application “to transfer or sell its generation assets.” But this is a misnomer. DP&L’s application does not propose a sale or transfer of its generation assets. In fact, DP&L states that it is now “developing a definitive plan for separation that, at present, would involve transferring the assets to a newly formed affiliate generation company.”<sup>3</sup> Apparently, **DP&L does not yet have a plan for separation even though it was required to have such a plan and to file the plan by December 31, 2013.**

Instead, DP&L’s application requests waivers of established PUCO filing requirements, while noting a complexity of financial, operational, and regulatory issues

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<sup>2</sup> *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-0426-EL-SSO et al, Opinion and Order of September 4, 2013 at 27-28 and *Entry Nunc Pro Tunc* of September 6, 2013.

<sup>3</sup> DP&L Application at 2, 10 (Filed December 30, 2013).

that DP&L is working to address or needs “to resolve” before making its actual, “supplemental” application for sale or transfer.<sup>4</sup> DP&L’s waiver requests include waiver of the requirement for a hearing (Ohio Admin. Code 4901:1-37-09(D)) and waiver (or postponement) of the requirement to state the fair market value of DP&L’s assets to be sold or transferred (Ohio Admin. Code 4901:1-37-09(C)(4)).

## **II. SUPPORT FOR OCC’S INTERVENTION**

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential customers may be “adversely affected” by DP&L’s Application, in that the Commission will be considering whether to grant requests to waive longstanding PUCO Rules applicable to the sale or transfer of hundreds of millions of dollars in Utility property. Residential customers’ interests may also be affected substantially if DP&L is permitted to transfer its generation assets to an affiliate at a cost below market value without reimbursing customers for stranded cost charges paid by them. Transfer at below market value would also affect all customers’ interests in giving DP&L’s affiliate an unfair advantage in the competitive market. Customer interests may also be affected in other ways once the details of the proposed transfer are determined.

DP&L’s anticipated sale or transfer of hundreds of millions of dollars of DP&L’s generation assets may impact customer interests in a variety of ways. Among other things, DP&L has noted changes in financing and operations that have been, or are required in the future to proceed with divestment of its generating assets.<sup>5</sup> These changes

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<sup>4</sup> DP&L Application.

<sup>5</sup> DP&L Application at 3-4.

may impact DP&L's costs, including capital costs, fuel costs, labor costs, and overhead costs.<sup>6</sup> Whether and to what extent DP&L may seek to recover from customers such costs related to its generating assets to be sold or transferred is unknown. At the same time, to the extent that the fair market value that DP&L is able to obtain for its generating assets exceeds the book value of its generating assets, it may be appropriate to compensate customers who paid for those assets through rates. It is those customers who paid \$441 million in stranded cost charges to DP&L related to these generating assets.<sup>7</sup> Surely, the PUCO must consider these burdens borne by customers when assessing whether the transfer of the assets, including the transfer price, meets the public interest standard of R.C. 4928.17.

DP&L has also noted various impediments to the sale or transfer of its generating assets, including potential contractual impediments to transferring certain assets and the closure of two generating plants.<sup>8</sup> Again, DP&L has not proposed a resolution of such contractual issues but merely states it is analyzing these issues and developing a plan to address them.<sup>9</sup> Nonetheless, the future disposition of these assets may affect customers' rates or interests.

Residential customers' interests may be affected by DP&L's indeterminate plans to separate its generating assets. Residential customers' interests may also be affected by DP&L's requests to waive the requirement for hearings and to waive the requirement to

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<sup>6</sup> *Id.*

<sup>7</sup> See *In the Matter of the Application of the Dayton Power & Light Company for Approval of Transition Plan, pursuant to 4928.31, Revised Code and for the opportunity to receive transition revenues as authorized under 4928.31 to 4928.40, Revised Code*, Case No. 99-1687-EL-ETP, Opinion and Order (Sept.21, 2000).

<sup>8</sup> DP&L Application at 5-6.

<sup>9</sup> *Id.*

state the fair market value of DP&L's assets to be sold or transferred. Thus, residential customers may be adversely affected by PUCO action in this proceeding. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing the residential customers of DP&L who will be affected by DP&L's future proposal to sell or transfer its generating assets and by its waiver requests. OCC seeks to ensure that residential customers pay only the legal and reasonable charges that are associated with providing service to them. Customers' rates, among other things, should also be credited if the Utility is able to sell or transfer its generating assets at a market price in excess of the recoverable market value on which the Utility's stranded cost claim was based. OCC's interest is different than that of any other party and especially different than that of DP&L whose advocacy includes the financial interest of its stockholders.

Second, OCC's advocacy for residential customers will include advancing the position that residential customers are responsible for no more than what is reasonable and lawful under Ohio law, for service that is adequate under Ohio law. This includes a

determination that customers should not bear costs incurred for generating assets after the market development period.<sup>10</sup> OCC's position is therefore directly related to the review by the PUCO, the authority with regulatory control of public utilities' rates and service obligations in Ohio.

Third, OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the advocate for residential utility customers, OCC has a very real and substantial interest in this case where, inter alia, the sale or transfer of generating assets paid for through customer rates is being evaluated.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the "extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's

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<sup>10</sup> R.C. 4928.38.

residential utility customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio confirmed OCC's right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC's interventions and that OCC should have been granted intervention in both proceedings.<sup>11</sup>

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio residential customers, the Commission should grant OCC's Motion to Intervene.

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Edmund "Tad" Berger

Edmund "Tad" Berger, Counsel of Record  
Assistant Consumers' Counsel  
Maureen Grady  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

Telephone: (Berger) (614) 466-1292

Telephone: (Grady) (614) 466-9567

[Edmund.berger@occ.ohio.gov](mailto:Edmund.berger@occ.ohio.gov)

[Maureen.grady@occ.ohio.gov](mailto:Maureen.grady@occ.ohio.gov)

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<sup>11</sup> See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20 (2006).



## CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Intervene* was served on the persons stated below via electronic transmission to the persons listed below, this 3rd day of February, 2014.

/s/ Edmund "Tad" Berger

Edmund "Tad" Berger  
Assistant Consumers' Counsel

### SERVICE LIST

William Wright  
Attorney General's Office  
Public Utilities Commission of Ohio  
180 E. Broad St., 6<sup>th</sup> Fl.  
Columbus, Ohio 43215  
[William.wright@puc.state.oh.us](mailto:William.wright@puc.state.oh.us)

Judi L. Sobecki  
The Dayton Power and Light Company  
1065 Woodman Drive  
Dayton, Ohio 45432  
[Judi.sobecki@dplinc.com](mailto:Judi.sobecki@dplinc.com)

Charles J. Faruki  
Jeffrey S. Sharkey  
Faruki Ireland & Cox PLL  
500 Courthouse Plaza, S.W.  
10 North Ludlow St.  
Dayton, Ohio 45402  
[cfaruki@ficlaw.com](mailto:cfaruki@ficlaw.com)  
[ssharkey@ficlaw.com](mailto:ssharkey@ficlaw.com)

Rocco D'Ascenzo  
Duke Energy Ohio, Inc.  
139 East fourth St.  
1303-Main  
Cincinnati, Ohio 45202  
[Rocco.dascenzo@duke-energy.com](mailto:Rocco.dascenzo@duke-energy.com)

David F. Boehm  
Michael L. Kurtz.  
Jody Kyler Cohn  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[jkylercohn@BKLawfirm.com](mailto:jkylercohn@BKLawfirm.com)

Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)

James F. Lang  
N. Trevor Alexander (0080713)  
Calfee, Halter & GRISWOLD LLP  
The Calfee Building  
1405 East Sixth Street  
Cleveland, Ohio 44114  
[jlang@calfee.com](mailto:jlang@calfee.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)

Kimberly W. Bojko  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43125  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[mohler@carpenterlipps.com](mailto:mohler@carpenterlipps.com)

Attorney Examiners:  
[Bryce.mckenney@puc.state.oh.us](mailto:Bryce.mckenney@puc.state.oh.us)  
[Gregory.price@puc.state.oh.us](mailto:Gregory.price@puc.state.oh.us)

Mark A. Whitt  
Andrew J. Campbell  
Gregory L. Williams  
Whitt Sturtevant LLP  
The KeyBank Building, Suite 1590  
88 East Broad Street  
Columbus, Ohio 43215  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  
[williams@whitt-sturtevant.com](mailto:williams@whitt-sturtevant.com)

Vincent Parisi  
Lawrence Friedeman  
Matthew White  
Interstate Gas Supply, Inc.  
6100 Emerald Parkway  
Dublin, Ohio 43016  
[vparisi@igsenergy.com](mailto:vparisi@igsenergy.com)  
[lfriedeman@igsenergy.com](mailto:lfriedeman@igsenergy.com)  
[mwhite@igsenergy.com](mailto:mwhite@igsenergy.com)

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