

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

On December 30, 2013, the Dayton Power and Light Company (“DP&L”) filed separate applications requesting authority to amend its corporate separation plan (“Corporate Separation Application”)<sup>1</sup> and to transfer its generating assets (“Asset Transfer Application”). DP&L indicated that it would “file a supplement to [the Asset Transfer Application], setting forth a detailed plan for such a separation, once the Company has had the opportunity to complete its review of the pending issues and their operational and financial impacts.”<sup>2</sup> The Asset Transfer Application requested waivers of the hearing requirement and the requirement to state the fair market value and book value of its generating assets.

On January 3, 2014, the Attorney Examiner issued an Entry requesting that parties file comments and reply comments regarding the Asset Transfer Application and DP&L’s waiver requests. As discussed further below, DP&L’s incomplete Asset

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<sup>1</sup> *In the Matter of the Application of the Dayton Power and Light Company to Amend its Corporate Separation Plan*, Case No. 13-2442-EL-UNC, (Dec. 30, 2013).

<sup>2</sup> Asset Transfer Application at 2 (Dec. 30, 2013).

Transfer Application is not yet ripe for review and the Public Utilities Commission of Ohio ("Commission") should hold in abeyance its ruling on DP&L's waiver requests until such time as DP&L provides a complete application.

## II. ARGUMENT

An electric distribution utility ("EDU") must receive Commission approval to transfer its generating assets.<sup>3</sup> The Commission can approve an application to transfer generating assets only if it "is satisfied that the sale or transfer is just, reasonable, and in the public interest . . . ."<sup>4</sup> The Commission must also ensure that the transfer furthers state policy objectives contained in R.C. 4928.02.<sup>5</sup>

To assist the Commission's review of an EDU's request to transfer its generating assets, Rule 4901:1-37-09(C), OAC, requires that an application to sell or transfer generating assets **shall, at a minimum**:

- (1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.
- (2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.
- (3) Demonstrate how the proposed sale or transfer will affect the public interest.
- (4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.<sup>6</sup>

The detailed information required by this rule enables the Commission to evaluate whether the transfer will promote competition, state policy, and the public interest and

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<sup>3</sup> R.C. 4928.17(E).

<sup>4</sup> Rule 4901:1-37-09(E), OAC.

<sup>5</sup> Rule 4901:1-37-02, OAC.

<sup>6</sup> Rule 4901:1-37-09(C), OAC (emphasis added).

how the Commission must reject or modify proposals to ensure that they conform to Ohio law. A party may receive a waiver of the application requirements only after demonstrating good cause.<sup>7</sup>

Although DP&L claimed that it will propose a more detailed plan to transfer its generating assets in a supplemental application, the Asset Transfer Application is organized as a discussion of the requirements contained in Rule 4901:1-37-09, OAC, for an application to transfer generating assets. The Asset Transfer Application, however, favors form over substance and fails to provide the information required by the Commission's rules. Thus, the Asset Transfer Application is not yet ripe for review. Likewise, because DP&L has not provided a complete application, DP&L has failed to set forth sufficient facts to support a finding of good cause to waive the requirement to hold a hearing and to state the book value and fair market value of its generating assets.

**A. DP&L has not sufficiently set forth the terms of the transfer**

The application must “[c]learly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.”<sup>8</sup> Rather than setting forth the specific terms of the transfer of its generating assets, DP&L discusses action steps that it has taken to prepare to transfer its generating assets and “complex issues that DP&L will need to resolve prior to separation of generation assets.”<sup>9</sup> For example, DP&L claims that it may be able to transfer its generating assets by December 31, 2014,<sup>10</sup> but DP&L fails to indicate under what terms it could achieve that goal. DP&L also claims

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<sup>7</sup> Rule 4901:1-37-02(C), OAC.

<sup>8</sup> Rule 4901:1-37-09(C)(1), OAC.

<sup>9</sup> Asset Transfer Application at 5.

<sup>10</sup> Asset Transfer Application at 1-2.

that it has yet to resolve issues related to its entitlement to purchase power from the Ohio Valley Electric Corporation (“OVEC”),<sup>11</sup> and cleanup and closure costs related to the Hutchings Station and Beckjord Generation Station.<sup>12</sup>

DP&L has not set forth the specific terms of the transfer because DP&L has yet to resolve and disclose its intentions regarding “a number of complex issues.”<sup>13</sup> Because the specific details of the terms and conditions of its asset transfer will not be revealed until DP&L files a supplemental application, DP&L’s Asset Transfer Application does not comply with the Commission’s rules and thus is not yet ripe for review.

**B. The effect of the transfer on current and future SSO service is not known**

The application must “[d]emonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.”<sup>14</sup> DP&L claims that it “expects that the transfer of its generation assets will not have a material effect on the terms and conditions under which it will provide a standard service offer (“SSO”).”<sup>15</sup> Because DP&L has not provided a complete application, the impact of the Asset Transfer Application on the standard service offer (“SSO”) cannot be determined.

**C. The Commission has not yet determined that the transfer of DP&L’s generating assets is in the public interest**

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<sup>11</sup> Asset Transfer Application at 5.

<sup>12</sup> Asset Transfer Application at 6.

<sup>13</sup> Asset Transfer Application at 5.

<sup>14</sup> Rule 4901:1-37-09(C)(2), OAC.

<sup>15</sup> Asset Transfer Application at 7.

The application must “[d]emonstrate how the proposed sale or transfer will affect the public interest.”<sup>16</sup> DP&L claims that “[t]he Commission found in DP&L’s ESP case that DP&L separating its generation assets was a benefit of DP&L’s ESP and was in the public interest. September 4, 2013 Opinion and Order.”<sup>17</sup> The Commission, however, made no such finding—nor could it have made such a finding without reviewing the specific terms and conditions upon which DP&L proposed to transfer its generating assets. Because DP&L has still failed to provide a complete application in this proceeding, the Commission cannot determine whether the asset transfer is in the public interest at this time.

**D. The Commission should reject DP&L's request for a waiver of the requirement to state the book value and fair market value of its generating assets**

DP&L requests a waiver of the requirement to state the book value and fair market value of its generating assets.<sup>18</sup> DP&L claims that the Commission should not require DP&L to provide the fair market value of its generating assets “because the transfer will not be completed until a future date and the value that the generation assets will change over time.”<sup>19</sup> Additionally, DP&L claims that it “has not finally determined whether the assets should be transferred or sold at book value, market value, or some other value but has committed to notify the Commission by a filing in this docket promptly when that determination has been made.”<sup>20</sup> Finally, DP&L claims that a waiver is consistent with the Commission’s treatment of Duke Energy Ohio, Inc.’s

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<sup>16</sup> Rule 4901:1-37-09(C)(3), OAC.

<sup>17</sup> Asset Transfer Application at 8.

<sup>18</sup> Rule 4901:1-37-09(C)(4), OAC.

<sup>19</sup> Asset Transfer Application at 8.

<sup>20</sup> Asset Transfer Application at 8.

("Duke") and Ohio Power Company's ("AEP-Ohio") corporate separation applications.<sup>21</sup>

As discussed below, the Commission should reject DP&L's request for a waiver.

In the rulemaking process which led to the creation of Rule 4901:1-37-09, OAC, the Commission determined that the market value of generating assets "could be helpful in determining whether the transfer is in the public interest."<sup>22</sup> Because the market value of DP&L's generating assets may assist the Commission in determining whether the proposed transfer is in the public interest—the main consideration before the Commission in this proceeding—it would be improper to grant DP&L's waiver request.

The Commission also should not entertain DP&L's waiver request because it is premature. The Commission has evaluated waiver requests on a case-by-case basis.<sup>23</sup> Thus, a determination of good cause turns upon the facts of each case. Because DP&L has failed to provide a complete application, the Commission lacks the necessary information to properly evaluate DP&L's waiver request.

Moreover, DP&L has failed to demonstrate good cause for a waiver. DP&L's claim that it has not determined whether the assets should be transferred at market

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<sup>21</sup> *Id.* at 8-9.

<sup>22</sup> *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD, Entry on Rehearing at ¶36 (Feb. 11, 2009).*

<sup>23</sup> *See In the Matter of the Application of Aqua Ohio, Inc. for Authority to Increase its Rates and Charges in its Lake Erie Division, Case No. 09-1044-WW-AIR, Entry at 2 (Jan. 20, 2010) (holding that waiver requests must be evaluated on a case-by-case basis); In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO, et al., Entry at 3 (Apr. 25, 2012) (holding that "inclusion of projected Turning Point solar project costs were an important consideration in the statutory test under Section 4928.143, Revised Code" and that it is "not only necessary for our consideration of the modified application, but is also in the public interest."); see also In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No.12-1230-EL-SSO, Entry at 6 (Apr. 25, 2012) (holding that the waiver request should be denied because the information is necessary for consideration of the type of application before the Commission).*

value or book value does not provide a basis for granting a waiver. DP&L is free to propose to transfer its generating assets at either book value or market value, but the Commission must determine whether the transfer valuation is just, reasonable, and in the public interest. And, although the value of DP&L's generating assets may change in the future, that is not a valid reason for dispensing with the requirement to state the fair market value of the generating assets altogether.

DP&L's claim that the outcome in the Duke electric security plan<sup>24</sup> justifies a waiver is also without merit because the differences between the *Duke ESP* and the Asset Transfer Application warrant different treatment. The *Duke ESP* was resolved through an uncontested stipulation and the waiver requests were expressly written into the stipulation.<sup>25</sup> The Commission previously stated in Duke's market rate offer case that matters can be resolved through a stipulation that would not otherwise be resolved in the same manner on a stand-alone basis.<sup>26</sup> Accordingly, as part of an uncontested stipulation, Duke agreed to set its next SSO price through a competitive bidding

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<sup>24</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, *et al.*, Opinion and Order (Nov. 22, 2011) (hereinafter "*Duke ESP*").

<sup>25</sup> *Id.*

<sup>26</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 64 (Feb. 23, 2011).



process, which reduced some total bills by nearly 20%,<sup>27</sup> and several signatory parties agreed to waive the requirements of Rule 4901:1-37, OAC.<sup>28</sup>

Moreover, DP&L has not demonstrated that it is similarly situated to AEP-Ohio. Because DP&L has failed to provide a complete application, this proceeding cannot be compared to the facts and circumstances that existed in AEP-Ohio's corporate separation case.

**E. The Commission should reject DP&L's premature request for a waiver of the hearing requirement**

DP&L claims that the Commission should also waive the hearing requirement because it has not "determined its final plan for separation and intends to supplement this application. Good cause also exists for continuing the waiver after DP&L's supplemental application is filed, because a comment process, together with a Staff evaluation of the request to transfer generation assets, will allow this Commission to evaluate the proposed transfer expeditiously."<sup>29</sup> DP&L also claims that an additional hearing is unnecessary because the Commission conducted an extensive hearing on the subject of the transfer of its generating assets in its ESP case.<sup>30</sup> DP&L also claims the Commission should waive the hearing requirement because it did so for Duke and AEP-Ohio.<sup>31</sup> DP&L's arguments lack merit.

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<sup>27</sup> According to the Commission's monthly newsletter, Duke Energy Ohio, Inc.'s residential customers' total bills decreased by 17% as a result of the competitive bidding process. *The Monitor* (January 2012) <http://www.puco.ohio.gov/emplibrary/files/media/Publications/Newsletters/MonitorJan2012.pdf> (last viewed on Feb. 4, 2014).

<sup>28</sup> *Duke ESP*, Stipulation at 25-26 (Oct. 24, 2011). Industrial Energy Users-Ohio ("IEU-Ohio") did not support or oppose this provision of the stipulation. *Id.* at FN 2.

<sup>29</sup> Asset Transfer Application at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 8-9.

The Commission should reject DP&L's absurd claim that the incompleteness of its Asset Transfer Application justifies a waiver. The Commission reviews waiver requests based upon the facts of each case. But DP&L has failed to provide the specific details of the transfer. Thus, it is premature to grant DP&L's waiver request. For the same reason, it is premature to compare this proceeding to the Duke or AEP-Ohio generating asset transfer cases. Moreover, until DP&L reveals the specific details in its supplemental application, the Commission cannot determine that a comment process will allow the Commission to sufficiently evaluate DP&L's request.

Additionally, the ESP hearing is not a substitute for a hearing in this proceeding because the ESP case did not resolve issues related to the terms and conditions of DP&L's generation asset transfer. DP&L's generation asset transfer was relevant to the ESP hearing only with respect to two issues. First, DP&L claimed that the projected earnings of its generation assets would potentially impair its total company financial integrity.<sup>32</sup> Thus, DP&L requested that the Commission authorize the Service Stability Rider ("SSR") to ensure that DP&L reaches a target total company return on equity between 7 and 11 percent in each year of the ESP.<sup>33</sup> Second, DP&L claimed that the Commission should authorize a five-year ESP and SSR so that it could transfer its generating assets in 2017.<sup>34</sup> As DP&L's Chief Financial Officer testified, "[t]he revenues from the ESP, including the SSR revenues, are needed to ensure the financial integrity of DP&L, and are required to meet DP&L's own obligations and enable the Company to

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<sup>32</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 17 (Sep. 4, 2013) (hereinafter "*DP&L ESP II*"); *DP&L ESP II*, DP&L Ex. 1 at 13.

<sup>33</sup> *DP&L ESP II*, Opinion and Order at 17, 25-26 (Sep. 4, 2013).

<sup>34</sup> *DP&L ESP II*, DP&L Ex. 16A at 5.

legally separate at December 31, 2017.”<sup>35</sup> Rather than discussing the specific terms of DP&L’s transfer of generating assets, the Commission’s Opinion and Order specifically required DP&L to file a separate application to receive authorization to transfer its generating assets.<sup>36</sup> That is exactly why DP&L filed an application in this proceeding.<sup>37</sup> Because the ESP case did not resolve issues related to the terms and conditions of DP&L’s generation asset transfer—besides setting a deadline—the Commission cannot rely upon that hearing in this proceeding.<sup>38</sup>

### III. CONCLUSION

For the reasons stated herein, IEU-Ohio urges the Commission to hold in abeyance its review of DP&L’s request to transfer its generation assets and its waiver requests until such time as DP&L provides a supplemental application setting forth the specific terms and conditions under which it intends to transfer its generation assets.

Respectfully submitted,

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<sup>35</sup> *DP&L ESP II*, DP&L Ex. 16A at 5. See also *DP&L ESP II*, The Dayton Power and Light Company’s Initial Post-Hearing Brief at 26-27 (May 20, 2013).

<sup>36</sup> *DP&L ESP II*, Opinion and Order at 16, 27-28 (Sep. 4, 2013).

<sup>37</sup> Asset Transfer Application at 2.

<sup>38</sup> DP&L’s Asset Transfer Application, however, is relevant to the ESP proceeding because it lends further support to intervenors rehearing requests in DP&L’s ESP with respect to the amount and duration of the SSR. Although DP&L asserted that the SSR was necessary to transfer its generating assets in 2017, DP&L has now revealed that it may be able to transfer its generating assets before December 31, 2014. Asset Transfer Application at 1-2. After DP&L transfers its generating assets, there will be no need for the SSR. Accordingly, IEU-Ohio urges the Commission to grant the applications for rehearing that contest the amount and duration of the SSR. *DP&L ESP II*, FirstEnergy Solutions Corp.’s Application for Rehearing at 48 (Oct. 4, 2013). See also *DP&L ESP II*, IEU-Ohio Application for Rehearing at 52-57 (Oct. 4, 2013).

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 4th day of February 2014, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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