

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
The Dayton Power and Light Company)
For Authority to Transfer or Sell its)
Generation Assets.)

Case No. 13-2420-EL-UNC

COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

The Opinion and Order ("ESP Order") modifying and approving Dayton Power and Light Company's ("DP&L") electric security plan ("ESP") required DP&L to file an application to transfer its generation assets.¹ After filing a placeholder application, which provided scant details, DP&L filed a supplemental application ("Application") to transfer its generation assets on February 25, 2014.

The Application still does not provide information required by the Public Utilities Commission of Ohio ("Commission") rules that is necessary to determine that the requested transfer satisfies statutory and administrative requirements. As discussed below, it fails to provide information regarding the terms and conditions of a transfer and information regarding the effect of the transfer on the standard service offer ("SSO").

Even though it cannot describe the terms of the proposed transfer to meet the minimum requirements of the Commission's rules, DP&L also seeks to secure

¹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO *et al.*, Opinion and Order at 15-16 (Sept. 4, 2013) ("DP&L ESP Case").

additional authority to shift economic and environmental risks associated with its generation assets to customers. Specifically, DP&L requests:

- authority to collect the Service Stability Rider (“SSR”) even if DP&L transfers its assets to a third party;
- authority to retain responsibility for future environmental liabilities associated with DP&L’s divested generation assets, as well as authority to “defer costs associated with environmental clean-up or remediation incurred by DP&L because of its ownership or operation of electric generation assets, and imposed in the future pursuant to federal or state law, rules, or regulations”;
- authority to retain the purchased power contract with the Ohio Valley Electric Corporation (“OVEC”) and to “defer the costs associated with OVEC, which are not currently being recovered through DP&L’s fuel rider” and to recover these expenses from all customers; and
- authority to modify its capital ratio “to maintain the greater of, (i) total debt of up to \$750 million or (ii) total debt equal to 75% of ratebase at the time of separation,” which would residually encumber DP&L, the electric distribution utility (“EDU”), with generation-related debt.

Additionally, DP&L requests that the Commission waive a hearing, thereby depriving parties of the due process rights provided by the Commission’s rules.²

DP&L’s failure to provide the information required by the Commission rules and its unlawful and unreasonable requests to saddle customers with the economic risks and environmental clean-up costs of the assets it intends to transfer while also violating the terms of the order permitting its merger with the AES Corporation (“AES”) render the Application unjust, unreasonable, and not in the public interest. Pursuant to the Commission’s rules, the Commission shall set an application for the transfer of generation assets for hearing if the application appears to be unjust, unreasonable, or not in the public interest, and “[t]he commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission

² Rule 4901:1-37-09(D), Ohio Administrative Code (“OAC”).

over a generation asset.”³ Rather than scheduling a hearing, however, the Commission should summarily reject the unlawful and unreasonable proposals contained in the Application and order DP&L to file an amended application for the transfer of the generation assets that complies with the Commission’s rules, Ohio law, and sound public policy.

II. ARGUMENT

An EDU must receive Commission approval to transfer its generation assets.⁴ The Commission may approve an application to transfer generation assets only if it “is satisfied that the sale or transfer is just, reasonable, and in the public interest”⁵ The Commission must also ensure that the transfer furthers state policy objectives contained in R.C. 4928.02.⁶

Pursuant to Rule 4901:1-37-09(C), OAC, an application to sell or transfer generation 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.⁷

³ *Id.*

⁴ R.C. 4928.17(E).

⁵ Rule 4901:1-37-09(E), OAC.

⁶ Rule 4901:1-37-02, OAC.

⁷ Rule 4901:1-37-09(C), OAC.

The detailed information required by this rule enables the Commission to evaluate whether the transfer will promote competition, state policy, and the public interest. A party may receive a waiver of the application requirements only after demonstrating good cause.⁸

A. DP&L has not clearly set forth the terms and conditions 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.”⁹ Several aspects of DP&L’s Application fall short of satisfying this requirement.

As in the prior filing, DP&L does not provide any detail regarding the terms of the transfer. It does not identify the transferee of the assets, stating it will transfer its generation assets to its unregulated affiliate or “to an unaffiliated third party through a potential sale.”¹⁰ It does not state the date of transfer, only offering that “a sale to a third party could occur as early as 2014.”¹¹ It fails to state the amount of the purchase price, offering only that the price will be at fair market value and that it will state the fair market value “no later than 75 days before the transfer date.”¹²

DP&L’s Application also proposes that, after the transfer of its generation assets, it be permitted to maintain temporarily total long-term debt of \$750 million or total debt equal to 75% of rate base, whichever is greater. DP&L’s request appears to raise the threshold question of whether the debt associated with the to-be-transferred generation

⁸ Rule 4901:1-37-02(C), OAC.

⁹ Rule 4901:1-37-09(C)(1), OAC.

¹⁰ Application at 2.

¹¹ *Id.*

¹² *Id.* If the assets are transferred to a third party, the “FMV shall be the sale price of the assets.” *Id.*

assets will remain for DP&L's customers to service. If so, DP&L fails to disclose the amount of debt it would leave behind in the transfer.

DP&L's Application further proposes to retain environmental liabilities associated with the historical operation of its generation assets and to seek to recover clean-up costs related to these liabilities from all customers. DP&L fails to identify any legal authority on which the Commission may approve its request or the magnitude of these liabilities or the generation assets to which the liabilities relate. Moreover, DP&L fails to identify how and when it will seek to recover the cost of these liabilities from customers.

Moreover, DP&L requests authority "to defer the costs associated with OVEC which are not currently being recovered through DP&L's fuel rider."¹³ As with the environmental clean-up costs it seeks to have customers pay, DP&L does not provide any legal basis that would permit the Commission to order this recovery or details regarding the magnitude of costs that it will not recover through the fuel rider.¹⁴ DP&L also fails to identify whether it would apply off-system sales margins from OVEC against the costs it is requesting authority to defer for future collection. DP&L is essentially asking for a blank check.

In summary, the Application does not clearly set forth the terms and conditions of the transfer as required by the Commission's rules.

B. DP&L has not demonstrated how the transfer will impact the standard service offer and ignores significant adverse consequences of its Application

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

¹³ *Id.* at 7.

¹⁴ *Id.* at 5-7.

the Revised Code”¹⁵ and “how the proposed sale or transfer will affect the public interest.”¹⁶ DP&L claims that the transfer will not have a material effect on the terms of the SSO because it will provide an SSO through a competitive bidding process after it transfers the assets.¹⁷ DP&L also 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.”¹⁸ Both of DP&L’s claims are incorrect.

Although DP&L states that the transfer will not affect SSO customers, it has proposed to continue existing nonbypassable charges and to lay the accounting foundation for future nonbypassable charges, which will affect SSO customers and shopping customers. DP&L, however, has not indicated the manner in which these charges will affect the existing and future SSO. Moreover, DP&L has not revealed the impact of the proposed modification to its capital ratio, discussed below, and whether that modification may be the impetus for additional future financial support in the form of yet another request for a nonbypassable charge. Without a quantification of the magnitude of those charges, DP&L cannot demonstrate the impact of its Application on the SSO.

Additionally, the Commission never determined that DP&L’s generation asset transfer is in the public interest—nor could it have made such a finding without reviewing the specific terms and conditions upon which DP&L proposed to transfer its generation assets. As discussed further below, because the terms and conditions

¹⁵ Rule 4901:1-37-09(C)(2), OAC.

¹⁶ Rule 4901:1-37-09(C)(3), OAC.

¹⁷ Application at 7.

¹⁸ *Id.* at 8.

proposed by DP&L are unlawful and unreasonable, DP&L's Application is not just, reasonable, and in the public interest.

C. DP&L's Application proposes terms and conditions that are unlawful, unreasonable, and not in the public interest

1. If permitted to continue, the SSR should terminate after the generation assets are transferred

The Application states that DP&L will transfer its generation assets to an affiliate at fair market value on or before May 31, 2017. The Application further claims that DP&L has "recently begun to evaluate the transfer of DP&L's generation assets to an unaffiliated third party through a potential sale. A sale to a third party could occur as early as 2014."¹⁹ The Application further states that "[r]egardless of the specific timing or mechanics of divestiture, the underlying legal basis supporting the Commission's Order in DP&L's ESP case (12-426-EL-SSO) outlining the need for DP&L's Service Stability Rider during the entire term of the ESP remains unchanged."²⁰ DP&L argues that because it is not a structurally separated utility, the losses of each company (distribution, transmission, or generation) may adversely affect the entire utility. DP&L further claims that "[g]iven current poor market conditions, DP&L could sustain a serious, continuing financial loss that strongly supports the ongoing need to recover the SSR throughout the term of the ESP."²¹ As discussed below, the Commission should reject DP&L's request to continue the SSR after it transfers its generation assets.

Initially, as discussed in more detail in Industrial Energy Users-Ohio's ("IEU-Ohio") Application for Rehearing in the ESP Case, the SSR is unlawful and

¹⁹ Application at 2.

²⁰ *Id.* at 3.

²¹ *Id.*

unreasonable.²² Moreover, after DP&L transfers its generation assets, even under the Commission's reasoning in the ESP Order, the Commission should direct DP&L to terminate the SSR. The Commission authorized the SSR to staunch an alleged revenue shortfall and to prop up DP&L's total company earnings. In recognition of the connection between the SSR and the transfer of the generation assets, the Commission limited its authorization of the SSR to a five-year term so that DP&L could unwind its first mortgage bonds and transfer its generation assets in 2017.²³ After DP&L transfers its generation assets, there simply is no reason to continue the SSR. DP&L, the EDU, will no longer be impacted by the performance of DP&L's generation assets, and, despite DP&L's previous claims to the contrary, DP&L can transfer its assets prior to 2017. Thus, the Commission should reject DP&L's attempt to extend the SSR after it transfers the generation assets to a third party.

Because the SSR is unlawful, the Commission should have denied DP&L's request to authorize the rider. After the generation assets are transferred, the rationale for continuing the rider will no longer exist. Therefore, the Commission should reject DP&L's request for authorization to continue the SSR after it transfers the generation assets.

2. DP&L's requests to retain environmental liabilities and for accounting modifications to defer related clean-up costs is unlawful and unreasonable

DP&L also seeks authorization (1) to retain responsibility for future environmental clean-up costs associated with its "historic ownership of its generation facilities" and "to

²² *DP&L ESP Case*, Application for Rehearing of Industrial Energy Users-Ohio at 26-57 (Oct. 4, 2013).

²³ 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 legally separate at December 31, 2017." *DP&L ESP Case*, Rebuttal Testimony of Craig L. Jackson at 5 (Mar. 28, 2013).

allow it to seek recovery for prudently incurred environmental clean-up costs for real property that had been used and useful for the production of electricity for the benefit of the customers of DP&L” and (2) for accounting modifications to permit it to defer the clean-up costs with interest at its cost of debt.²⁴ Because there is not a lawful basis for either request and neither request is reasonable, the Commission should reject this part of the Application because it is unjust, unreasonable, and not in the public interest.

a. Authority to seek to recover environmental clean-up costs from customers

As noted above, the nature and scope of the liabilities that DP&L seeks to have customers pay at some time in the future is not disclosed. Even if DP&L had provided that information, it would not form a basis for the Commission to authorize DP&L to seek to recover environmental clean-up costs. Ohio law provides only three methods of establishing customer charges, and none permits the Commission to authorize the recovery of clean-up costs that DP&L is seeking.

The first means of establishing a charge or price is through a Market Rate Offer (“MRO”) under R.C. 4928.142. R.C. 4928.142, however, limits the price that may be authorized under an MRO to that resulting from the auction process. The environmental clean-up costs of DP&L are not related to the price of electricity produced by the auction process and could not be recovered under the limited terms of an MRO.

The second process is through the cost recovery mechanisms that can be included in an ESP under R.C. 4928.143. The costs that shall be recovered in an ESP are limited to the supply of electric generation service. Plainly, the environmental costs associated with plant held by a third party would not be a cost of the generation

²⁴ Application at 3-5.

supplied to customers. An ESP also may include recovery of other costs, but none of the permitted additional provisions extends authority for the Commission to authorize recovery of future unknown environmental clean-up costs.²⁵ Because of the statutory limits contained in R.C. 4928.143, therefore, the Commission could not authorize the recovery of these prospective unknown environmental clean-up costs.

The third possibility for the recovery of these costs would be through a base distribution rate case under R.C. Chapter 4909. R.C. 4909.15(A)(4), however, limits the expenses that an EDU may recover through its base distribution rates to “[t]he cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section” with some adjustments. The environmental clean-up costs would be those associated with assets no longer held by the EDU or used in the rendering of service during the test period. Because these are not costs of the EDU to provide service to customers, the costs would not be recoverable from customers.²⁶

Thus, the “relief” that DP&L is seeking, the authorization to file an application to recover environmental clean-up costs at some unknown future time, is meaningless. The Commission lacks authority to permit DP&L to recover these costs currently; thus,

²⁵ The Commission may not include a provision in an ESP that is not authorized by R.C. 4928.143(B)(2)(b). *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512 (2011).

²⁶ R.C. 4909.15(A)(4). See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Case No. 07-551-EL-AIR, *et al.*, Opinion and Order at 14 (Jan. 21, 2009). The Commission’s recent decision affording Duke Energy Ohio, Inc. (“Duke”) recovery of some remediation costs is inapplicable to the facts presented by DP&L. To the extent that the Commission’s decision is lawful (and it has been appealed to the Supreme Court by three parties), Duke sought remediation costs for property it currently owns and it was not permitted to include carrying charges. See *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order at 36-46 & 59-60 (Nov. 13, 2013). In contrast, DP&L is seeking to transfer the assets and to defer future environmental clean-up costs with interest for the property it will have transferred.

there is no legal basis for the Commission to authorize DP&L to seek recovery in the future. Certainly, DP&L can file any frivolous application it chooses, but the Commission should not encourage that behavior by granting authorization to do so.

Moreover, the Commission has implicitly found that it is reasonable to relieve customers of the environmental liabilities when a generation asset is transferred to an affiliate. In the Ohio Power Company ("AEP-Ohio") generation asset transfer case, the Commission noted that "AEPGenCo would receive [AEP-Ohio's] existing generation units and contractual entitlements and assume all liabilities associated with the transferred generation assets, including retired plants and the associated liabilities."²⁷ The Commission did not have to make an explicit finding as to AEP-Ohio's request because on its face the transfer of all liabilities to the new owner is patently reasonable.

On a related issue, however, the Commission rejected AEP-Ohio's attempt to saddle customers with liability for pollution control revenue bonds ("PCRBs") that AEP-Ohio indicated would be difficult to transfer to the new owner. With regard to the PCRBs, AEP-Ohio sought authority to retain the bonds, thus exposing customers to the costs of those bonds. The Commission granted approval of the request to transfer the generation assets "contingent upon a filing with the Commission demonstrating that AEP-Ohio ratepayers have not and will not incur any costs associated with the cost of servicing the associated debt."²⁸ While it did not order the EDU to transfer the bonds to the affiliate, the Commission required AEP-Ohio to hold ratepayers harmless for the

²⁷ *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Finding and Order at 7 (Oct. 17, 2012) (hereinafter "AEP-Ohio Corporate Separation Case").

²⁸ *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 No. 11-346-EL-SSO, *et al.*, Opinion and Order at 59 (Aug. 8, 2012) (hereinafter "AEP-Ohio ESP Case").

costs of the pollution control revenue bonds.²⁹ Later, the Commission reaffirmed that AEP-Ohio's ratepayers would not be responsible for costs of defeasance of the pollution control revenue bonds when it approved AEP-Ohio's corporate separation plan.³⁰ As these opinions demonstrate, it is just and reasonable that the environmental costs associated with generation assets that are transferred should not be the responsibility of future ratepayers.

b. Accounting authority

The Commission should also reject DP&L's request for accounting authority to defer the anticipated environmental clean-up costs with interest at its cost of debt because the modification DP&L seeks is unlawful and unreasonable.

DP&L has asked the Commission to invoke its authority under R.C. 4905.13 to permit accounting modifications. DP&L's request, however, assumes that the Commission may authorize accounting changes permitting DP&L to defer environmental clean-up costs associated with generation assets. The Commission's authority to authorize accounting modifications related to generation-related assets, however, is limited. Pursuant to R.C. 4928.03, retail electric generation service is declared a competitive retail electric service. Because retail electric generation service is declared competitive, the Commission does not have authority to regulate that service except as provided by R.C. 4928.05. Under R.C. 4928.05, a competitive retail electric service supplied by an EDU is not subject to the Commission's accounting supervision under R.C. 4905.13. R.C. 4928.05 does recognize that the Commission may exercise authority over an EDU's competitive retail generation service as provided by R.C.

²⁹ *Id.*

³⁰ *AEP-Ohio Corporate Separation Case*, Finding and Order at 17-18.

Chapter 4928, but R.C. 4928.144 limits the Commission's authority over the EDU's accounting of deferrals to a phase-in of a rate or price established as a provision of an SSO under R.C. 4928.141 to R.C. 4928.143.

The Commission's limited authority does not provide a basis for the Commission to approve the accounting relief sought by DP&L for two reasons. First, this Application is not seeking authority to phase-in a rate or price established as a provision of an SSO. Second, even if this proceeding were somehow related to a rate or price of an SSO (and it clearly is not), the cost recovery that DP&L seeks could not be approved as a term of an MRO or ESP. As demonstrated above, the costs that DP&L is seeking to defer could not be recovered in prices, rates, or charges that may be authorized under either R.C. 4928.142 or R.C. 4928.143. Because the Application seeks authorization of accounting modifications outside the authority of the Commission, it cannot lawfully authorize the requested relief.

Further, the Commission should also find that the request to modify accounting authority is unreasonable for the same reason discussed above regarding the retention of responsibility for environmental clean-up costs. As DP&L makes clear, the accounting modifications it is seeking are the first step of a process by which DP&L will seek to recover environmental clean-up costs from its customers. As the Commission previously determined in the AEP-Ohio cases discussed above, customers should be held harmless from all liabilities and in particular costs of pollution control revenue bonds related to generation assets that will be transferred to the unregulated competitive affiliate. As in the AEP-Ohio cases, the Commission should shut the door on DP&L's claim that customers should pay for environmental clean-up costs that DP&L

may incur later. There is no reason to allow DP&L to cross that threshold by approving accounting modifications when it is unreasonable for future customers to incur the costs associated with generation assets that will be transferred to either an unregulated affiliate or an independent third party.

In summary, the Commission should reject both of DP&L's requests regarding environmental clean-up costs. There is no lawful or reasonable basis for the Commission to authorize DP&L to seek recovery of these costs since they could not be recovered in either a lawful SSO or a distribution rate, and the Commission has already determined that customers should be held-harmless even when the EDU has retained "ownership" of the indebtedness associated with transferred generation assets. Further, the Commission lacks the authority to authorize the accounting modifications that DP&L is seeking, and the requested modifications would be unreasonable.

3. DP&L's request to defer OVEC costs is unlawful and unreasonable

Relying on AEP-Ohio's representation that it could not secure approval from other OVEC members to transfer its interest in its entitlement to OVEC generation on favorable terms, DP&L claims it has no expectation that the other OVEC members will consent to DP&L's transfer of its interest in OVEC to an affiliate or third party. Thus, DP&L requests that it be permitted to retain its interest in OVEC. DP&L further requests "accounting authority pursuant to Ohio Rev. Code 4905.13, to permit DP&L to defer the costs associated with OVEC, which are not currently being recovered through DP&L's fuel rider."³¹ DP&L proposes to accrue carrying costs on these expenses and to collect

³¹ Application at 6-7.

them from all customers at a date to be determined in another Commission proceeding.³² DP&L's request is unlawful and unreasonable for several reasons.

Initially, DP&L does not provide details regarding the magnitude of costs that it is seeking to defer for future collection. DP&L also fails to identify whether it would apply OVEC off-system sales margins against the costs it is requesting authority to defer. DP&L has failed to comply with the disclosure requirements of Commission rules, as noted above.

Additionally, it would be unlawful to authorize DP&L to defer and collect generation-related costs through a nonbypassable charge. R.C. 4928.02(H) prohibits anticompetitive subsidies. As the Court has stated, "each service component [is] required to stand on its own."³³ Based on R.C. 4928.02(H), the Commission has rejected requests for charges that would cross-subsidize an EDU's generation business segment because the charge would be anticompetitive. In response to AEP-Ohio's request for authority to recover closure costs (including environmental clean-up costs) for Unit 5 of the Sporn Generating Station, the Commission held that AEP-Ohio was not entitled to a nonbypassable rider because such a rider would subsidize AEP-Ohio's generation business in violation of R.C. 4928.02(H).³⁴ Likewise, in Duke's MRO case, the Commission rejected a nonbypassable "circuit breaker" provision in reliance on R.C. 4928.02(H).³⁵ Consistent with these decisions, the Commission should reject DP&L's

³² *Id.*

³³ *Migden-Ostrander v. Pub. Util. Comm'n of Ohio*, 102 Ohio St.3d 451, 453 (2004).

³⁴ *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (Jan. 11, 2012) (hereinafter "*Sporn Decision*").

³⁵ "[I]t is the policy of the state to avoid anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service and vice versa. If Duke were permitted to recover the costs included in Rider SCR from shopping customers, under any circumstances, we believe that it

proposal to defer the shortfall in generation-related revenue for later recovery through a nonbypassable charge.

Moreover, as stated above, R.C. 4905.13 does not provide the Commission with authority to authorize DP&L to make accounting modifications to defer expenses related to competitive services such as generation.

Even if the Commission has authority to authorize DP&L to adopt such accounting modifications (which it does not), the Commission should not exercise that authority because DP&L has failed to demonstrate that it cannot transfer its ownership interest in OVEC. First, DP&L implies it has not attempted to transfer its ownership interest in OVEC; thus, it asks the Commission to assume something that may not be true, i.e., that other OVEC members will not agree with DP&L's request to transfer its interest to a third party. Second, a review of the terms of the Amended and Restated Intercompany Power Agreement ("ICPA") demonstrates that DP&L could transfer its interest to its affiliate, Dayton Power and Light Energy Resources ("DPLER"), or a third party.

The ICPA, a Federal Energy Regulatory Commission ("FERC") approved contract, states that a sponsoring company may assign its ownership interest to a Permitted Assignee upon thirty-days' notice:

[A]ny Sponsoring Company shall be permitted to, upon thirty (30) days notice to the Corporation and each other Sponsoring Company, without any further action by the Corporation or the other Sponsoring Companies, **assign all or part of its rights, title and interests in, and obligations under this Agreement to a Permitted Assignee**, provided that, the assignee and assignor of the rights, title and interests in, and obligations

would create an anticompetitive subsidy." *In the Matter of 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 63 (Feb. 23, 2011) (hereinafter "Duke MRO Order").

under, this Agreement have executed an assignment agreement in form and substance acceptable to the Corporation in its reasonable discretion (including, without limitation; the agreement by the Sponsoring Company assigning such rights, title and interests in, and obligations under, this Agreement to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment).³⁶

The ICPA defines a Permitted Assignee as either an affiliate with a credit rating of BBB (Standard & Poor's) or Baa3 (Moody's) or an affiliate with a lesser credit rating that agrees in writing to satisfy all of the obligations to OVEC.³⁷

Additionally, the ICPA permits DP&L to transfer its ownership interest to a third party upon notice to the sponsoring companies, which triggers a thirty-day right of first refusal.³⁸

³⁶ ICPA at 20-21 (Sections 9.18 to 9.182). For ease of reference, excerpted pages of the ICPA are attached to these Comments as "Attachment 1."

³⁷ The ICPA at 4 (Section 1.0115) provides:

"Permitted Assignee" means a person that is (a) a Sponsoring Company or its Affiliate whose long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, has a Standard & Poor's credit rating of at least BBB and a Moody's Investors Service, Inc. credit rating of at least Baa3 (provided that, if the proposed assignee's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such assignee's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); **or (b) a Sponsoring Company or its Affiliate that does not meet the criteria in subsection (a) above, if the Sponsoring Company or its Affiliate that is assigning its rights, title and interests in, and obligations under, this Agreement agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations related to the assigned rights, title and interests to the extent such obligations are not satisfied by the assignee of such rights, title and interests;** provided that, in no event shall a person be deemed a "Permitted Assignee" if counsel for the Corporation reasonably determines that the assignment of the rights, title or interests in, or obligations under, this Agreement to such person could cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer. (Emphasis added).

³⁸ See ICPA at 21-23 (Section 9.183(a) through (e)).

Despite the fact that the ICPA provides DP&L with the means to transfer its interest in OVEC, DP&L has proposed that its customers bear the cost of its refusal to act. The Commission should not indulge DP&L's request for customers to bear additional unlawful nonbypassable charges—especially when they are related to costs that could be avoided through prudent action.

4. DP&L is seeking to retain debt that may expose customers to unreasonable leverage

DP&L requests that it be permitted to temporarily maintain total long-term debt of \$750 million or total debt equal to 75% of rate base, whichever is greater, after the transfer of its generation assets. The Application further indicates that it is likely that DP&L's equity ratio will fall below the 50% level in the course of the debt restructuring necessary to achieve separation in order to effectuate full legal separation of its generation assets.³⁹ Therefore, DP&L requests temporary relief from its commitment in the Stipulation in Case No. 11-3002-EL-UNC to maintain an equity ratio of at least 50%.⁴⁰ It also requests that it be permitted to maintain the resulting debt level and implied capital structure through "at least 2018," after which further debt reductions will be conditioned on market recovery and an ability to reallocate debt to its non-regulated affiliate.⁴¹ Not only is DP&L requesting relief from the Stipulation, it wants that relief to be indefinite in duration.

³⁹ Application at 7-8.

⁴⁰ *In the Matter of the Application of The AES Corporation, Dolphin Sub, Inc., DPL Inc. and The Dayton Power and Light Company for Consent and Approval for a Change of Control of The Dayton Power and Light Company*, Case No. 11-3002-EL-MER, Stipulation and Recommendation at 4 (Oct. 26, 2011) ("Merger Case"). *Id.*, Finding and Order at 9 (Nov. 22, 2011).

⁴¹ Application at 8.

It is unlawful to permit DP&L to transfer its generation assets while leaving DP&L responsible for servicing the associated debt because it would provide an unlawful subsidy to DP&L's unregulated affiliate or a third party. That subsidy is prohibited, as discussed above.

Further, the result is plainly unreasonable. The Commission already has rejected a similar AEP-Ohio request to saddle the EDU with generation-related debt without recourse to its affiliate. As discussed previously, AEP-Ohio was required to hold customers harmless from pollution control revenue bonds that it stated it could not transfer until after corporate separation.⁴² Because it is unreasonable to saddle DP&L's customers with debt related to assets held by a third party, the Commission should also reject DP&L's proposal to leave the debt with the EDU.

Moreover, DP&L's request to obtain relief from its previous commitment that it maintain a capital structure that includes an equity ratio of at least 50% is not appropriate because it violates the Stipulation and could potentially endanger the investment grade credit rating that DP&L committed to maintain.⁴³ The provision of the Stipulation requiring an equity ratio of at least 50% helps to safeguard against the merger with AES potentially having a detrimental effect on DP&L's financial condition. By endangering DP&L's credit rating, the proposed changes expose DP&L to increased debt costs it may try to pass on to its customers.⁴⁴

⁴² *AEP-Ohio ESP Case*, Opinion and Order at 59 (Aug. 8, 2012).

⁴³ *Merger Case*, Finding and Order at 6 (Nov. 22, 2011).

⁴⁴ Although this Application does not present an issue regarding the continuing operation of DP&L, the Commission has previously indicated that it will not endorse an unsustainable business model. *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 25-26 (Sept. 2, 2009).

The approval of the merger was predicated on certain customer protections regarding the retention of a reasonable equity ratio. DP&L now seeks to renege on that commitment. The Commission should not authorize the highly leveraged position that could result from DP&L's proposal.

5. The Commission should deny DP&L's request to waive a hearing

Rule 4901:1-37-09(D), OAC, states that when the Commission receives an application seeking approval for the transfer of generation assets, "[t]he commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset" and may set a hearing if it determines that the application appears unjust, unreasonable, or not in the public interest. DP&L requests that the Commission waive the hearing requirement. It bases that request on the Commission's decision not to conduct an evidentiary hearing when it considered recent generation asset transfers by AEP-Ohio and Duke.⁴⁵ DP&L's arguments that no evidentiary hearing is necessary fail on factual and legal grounds.

The Commission has evaluated waiver requests on a case-by-case basis.⁴⁶ Thus, a determination of good cause turns upon the facts of each case. As demonstrated in these comments, DP&L's Application is incomplete and, if approved as

⁴⁵ Application at 11.

⁴⁶ 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); *AEP-Ohio ESP Case*, 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).

proposed, would likely cripple the financial health of the EDU by saddling it with legacy generation-related debt and environmental liabilities. Thus, the Commission should require an evidentiary hearing because the Application appears to be unjust, unreasonable, and not in the public interest.

Further, the Duke and AEP-Ohio decisions do not provide a ground for waiving a hearing. In the Duke case,⁴⁷ Duke received approval of the generation asset transfer as part of a comprehensive stipulation and recommendation to resolve Duke's proposed ESP application. That stipulation contained a number of conditions associated with approval of the generation asset transfer that are not present in DP&L's Application. For example, one section provided:

(8) Generating Assets

(a) Duke will transfer title, at net book value, to all of its generation assets out of Duke. Such transfer shall occur on or before December 31, 2014, and Duke commits to using its best commercial efforts to complete the transfer as soon as practicable upon its acceptance of a Commission order approving the stipulation and upon receipt of necessary regulatory approvals. Staff, or an independent auditor, at the Commission's discretion and with costs thereof to be recovered through Rider SCR, shall audit the terms and conditions of the transfer of the generation assets to ensure compliance with the stipulation and shall also audit Duke's compliance with Section 4928.17, Revised Code, and Rule 4901:1-37, O.A.C., to ensure that no subsidiary or affiliate of Duke that owns competitive generation assets has any competitive advantage due to its affiliation with Duke. The parties support Duke's request for a waiver of the Commission's rule requirements, as set forth in Rule 4901:1-37-09(B) through (D), O.A.C., relating to the sale or transfer of generating assets. **Approval of the stipulation shall constitute the Commission's consent required by paragraphs (A) and (E) of that rule, and that no hearing is required under paragraphs (D) and (E) of that rule.** Staff shall be

⁴⁷ *In the Matter of 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 No. 11-3549-EL-SSO et al., Opinion and Order (Nov. 22, 2011) (hereinafter "Duke ESP Case").

provided with access to books and records in compliance with paragraph (F) of that rule.

(b) Approval of this stipulation will serve as the Commission's approval of full legal corporate separation, as contemplated by Section 4928.17(A), Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and all of Duke's generation assets shall be transferred to an affiliate. Full legal corporate separation will be implemented as soon as reasonably possible after necessary regulatory approvals are obtained. **Following the transfer of the generation assets, Duke shall not, without prior Commission approval, provide or loan funds to, provide any parental guarantee or other security for any financing for, and/or assume any liability or responsibility for any obligation of subsidiaries or affiliates that own generating assets;** provided, however, that contractual obligations arising before the signing of the stipulation shall be permitted, but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or it is commercially infeasible for Duke to transfer such obligation to its subsidiary or affiliate, **and provided further that, on and after the signing of this stipulation, Duke shall ensure that all new contractual obligations have a successor-in-interest clause that transfers all Duke responsibilities and obligations under such contracts and relieves Duke from any performance or liability under the contracts upon the transfer of the generation assets to its subsidiaries.** This does not restrict Duke's ability to receive and pass through to the subsidiary(ies) that own the generation assets equity contributions from its parent that are in support of the generation assets, nor does it restrict Duke's ability to receive dividends from the subsidiary(ies) that own the generation assets and pass through such dividend(s) to its parent. **Generation-related costs associated with implementing corporate separation shall not be recoverable from customers.** Any subsidiary of Duke to which generation assets are transferred shall not use or rely upon the rating(s) from credit rating agency(ies) for Duke if such subsidiary currently does not maintain separate rating(s) from the credit rating agency(ies), then upon transfer of any of the generation assets, it shall either seek to establish such rating(s) or shall tie its credit rating to DEC as soon as practicable, but no later than six months following such transfer.⁴⁸

⁴⁸ *Duke ESP Case*, Opinion and Order at 29-31 (emphasis added).

Thus, unlike the present case, the *Duke ESP Case* addressed not just the SSO but included (as part of a comprehensive stipulation and recommendation) the resolution of issues regarding the transfer of generation assets. The Commission approval of the asset transfer (by accepting the stipulation and recommendation) specifically constituted a finding that the public interest demonstration required by Rule 4901:1-37-09(E), O.A.C., had been met, and that no hearing was necessary.⁴⁹ Duke also agreed (unlike DP&L's Application in this proceeding) that any generation-related implementation costs associated with the asset transfer would not be recovered from its EDU customers.

Additionally, the stipulation and recommendation adopted by the Commission in the *Duke ESP Case* specifically provided that:

This Stipulation is submitted for purposes of these proceedings only and neither this Stipulation nor any Commission order considering this Stipulation shall be deemed binding in any other proceeding nor shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation.⁵⁰

Thus, DP&L's reliance upon the *Duke ESP Case* to support its request for a waiver of the hearing requirement should carry no weight.

DP&L fares no better when it relies upon *AEP-Ohio's Corporate Separation Case* to support its request for a waiver. Although DP&L is correct that the Commission did not hold a hearing in the *AEP-Ohio Corporate Separation Case*, it did so only after finding the terms and conditions associated with Ohio Power's generation asset divestiture had been thoroughly considered in the evidentiary hearing associated with

⁴⁹ Issues regarding the generation asset transfer were considered simultaneously during the evidentiary hearing on Duke's proposed ESP. *Id.* at 31-32.

⁵⁰ *Duke ESP Case*, Stipulation and Recommendation at 41-42 (Oct. 24, 2012).

AEP-Ohio's second ESP.⁵¹ In contrast, DP&L had not even filed its Application at the time of its ESP proceeding; thus, the Application could not have been considered in the evidentiary hearing.⁵² Further, AEP-Ohio's generation asset transfer was conditioned upon the transfer occurring at net book value,⁵³ and Ohio Power agreed that with limited exceptions all generation assets and liabilities would be transferred from AEP-Ohio to its affiliate,⁵⁴ facts and circumstances that do not exist in the present proceeding. Thus, there is nothing substantive in the *AEP-Ohio Corporate Separation Case* that supports DP&L's waiver request. DP&L has fallen far short of good cause to grant a waiver of the hearing requirement. Its waiver request must be denied.

III. CONCLUSION

For the reasons stated herein, IEU-Ohio urges the Commission to reject this Application and direct DP&L to file a complete application when it can provide the information required by the Commission's rules. To the extent that the Commission does address the authorizations that DP&L has sought, it should reject DP&L's requests for authority to extend and introduce anticompetitive generation-related nonbypassable charges, for authority to retain environmental liability for plants it will not own, and for authority to renege on the commitments it made when seeking approval of the merger with AES. Further, it should suspend the authorization of the SSR if it authorizes DP&L

⁵¹ *AEP-Ohio Corporate Separation Case*, Finding and Order at 11. As demonstrated by its appeal of the Commission's failure to properly review the terms and conditions of the AEP-Ohio transfer of generation assets, IEU-Ohio, however, does not concede that the Commission lawfully relied upon the ESP hearing to waive a hearing in the *AEP-Ohio Corporate Separation Case*.

⁵² *DP&L ESP Case*, Opinion and Order at 16. "[T]he ESP term will end on December 31, 2016, and the Commission expects DP&L to file a generation divestment plan that divests all of its generation assets by that date."

⁵³ *AEP-Ohio Corporate Separation Case*, Finding and Order at 4.

⁵⁴ *Id.* at 5, 23.

to transfer the assets to a third party. If the Commission does not reject DP&L's Application outright, the Commission should set this matter for hearing as required by its rules because the Application seeks to transfer generation assets under terms that are unjust, unreasonable, and not in the public interest.

Respectfully submitted,

/s/ Frank P. Darr

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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 25th day of March 2014, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

/s/ Frank P. Darr

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VIA ELECTRONIC FILING

April 27, 2011

Re: Re-Filing of Amended and Restated Inter-Company Power
Agreement and Amended and Restated OVEC-IKEC Power
Agreement
Docket No. ER11-

Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Dear Secretary Bose:

Pursuant to Section 205 of the Federal Power Act and Section 35.13 of the Commission's regulations, Ohio Valley Electric Corporation, together with its wholly owned subsidiary, Indiana-Kentucky Electric Corporation ("IKEC", and Ohio Valley Electric Corporation, together with IKEC, herein referred to as "OVEC") hereby re-submits its March 23, 2011 filing made in Docket No. ER11-3181 due to inadvertent use of an incorrect Filing Type. This re-submission, as before, includes:

- (1) An Amended and Restated Inter-Company Power Agreement, dated as of September 10, 2010 ("Amended ICPA") among OVEC and other parties thereto (referred to as the "Sponsoring Companies"),¹ which amends and

¹ The "Sponsoring Companies" are: Allegheny Energy Supply Company, LLC, Appalachian Power Company ("Appalachian"), Buckeye Power Generating, LLC ("Buckeye"), Columbus Southern Power Company ("CSP"), The Dayton Power and Light Company ("Dayton Power"), Duke Energy Ohio, Inc. ("Duke Ohio"), FirstEnergy Generation Corp. ("FirstEnergy Generation"), Indiana Michigan Power Company ("I&M"), Kentucky Utilities Company ("KU"), Louisville Gas and Electric Company ("LG&E"), Monongahela Power Company ("Mon Power"), Ohio Power Company ("OPCo"), Peninsula Generation Cooperative ("Peninsula") and Southern Indiana Gas and Electric Company ("SIGECO").

restates in its entirety the current Amended and Restated Inter-Company Power Agreement, dated as of March 13, 2006, as amended by Modification No. 1, dated as of March 13, 2006 (the "Current ICPA").

- (2) An Amended and Restated Power Agreement, dated as of September 10, 2010 ("Amended OVEC-IKEC Agreement") between OVEC and IKEC, which amends and restates in its entirety the current Amended and Restated Power Agreement, dated as of March 13, 2006 (the "Current OVEC-IKEC Agreement").

In accordance with the Commission's Order No. 714, OVEC hereby submits the above agreements in eTariff format and, as discussed below, respectfully requests a shortened notice period of fourteen (14) days and waiver of the Commission's 60-day notice requirements pursuant to Section 35.11 of its regulations to the extent necessary to grant an effective date as soon as possible, but in any event on or before May 23, 2011, which is sixty (60) days after the date of OVEC's original March 23, 2011 filing.

I. Resubmittal

OVEC previously filed the Amended ICPA and the Amended OVEC-IKEC Agreement in Docket No. ER11-3181 on March 23, 2011. In that filing, OVEC erroneously used Filing Type 370 (Refile Tariff (Baseline Filing)) instead of Filing Type 390 (New Company's Tariff (Initial Tariff Baseline)). In accordance with direction from the Commission's Staff, OVEC filed a cancellation request for the March 23, 2011 filing in Docket No. ER11-3181 and is hereby re-submitting the Amended ICPA and Amended OVEC-IKEC Agreement to correct the Filing Type. In addition, OVEC corrects an error in two of the attachments to the March 23rd filing (Amended ICPA Clean Tariff and Marked

Tariff) and the XML file.² However, the substance of the March 23, 2011 filing, contained in the attached Transmittal Letter, remains accurate and is hereby incorporated by reference.

II. Effective Date

As further explained in the attached March 23, 2011 filing letter, OVEC requested an effective date of May 23, 2011. OVEC originally filed and served the Amended ICPA and Amended OVEC-IKEC Agreement on March 23, 2011 in Docket No. ER11-3181. The Commission published a notice of filing in the Federal Register on March 31, 2011, establishing a comment period ending at 5 p.m. Eastern Time on April 13, 2011.³ No comments, protests, or interventions were filed. Because the cancellation request for the March 23, 2011 filing and this re-submission of the Amended ICPA and Amended OVEC-IKEC Agreement merely correct ministerial mistakes, OVEC respectfully requests a shortened notice period of fourteen (14) days and that the Commission waive its 60-day notice requirements pursuant to Section 35.11 of its regulations to the extent necessary to grant an effective date as soon as possible, but in any event on or before May 23, 2011, which is sixty (60) days after the date of OVEC's original March 23, 2011 filing. Such waiver will permit OVEC to timely refinance its current long-term debt and take other actions to ensure its continued operations consistent with the Amended ICPA and will not prejudice any interested parties, who have been on notice of the Amended ICPA and Amended OVEC-IKEC Agreement since March 23, 2011 and to date have filed no comments, protests, or interventions.

² In the March 23rd filing, OVEC erroneously included clean and marked tariff attachments and XML text that omitted a final change to the underlying contract. In particular, the previously filed attachments and XML text did not include Peninsula as a Sponsoring Company (Peninsula acquired a 6.65% interest in the Current ICPA from FirstEnergy Generation and became a signatory to the Amended ICPA prior to the submission of OVEC's initial application). The attachments filed herewith correct this error. The other attachments included in the previous filing, including the executed version of the Amended ICPA appended to the Transmittal Letter and all versions of the Amended OVEC-IKEC Agreement, were correct and complete.

³ Combined Notice of Filings, 76 Fed. Reg. 17,850 (Mar. 31, 2011).

III. Documents submitted

Submitted with this resubmittal letter are:

- (a) The March 23, 2011 transmittal letter, including execution copies of the Amended ICPA, Amended OVEC-IKEC Agreement, and Certificates of Concurrence of each of the Sponsoring Companies as to the Amended ICPA;⁴
- (b) Copies of the Amended ICPA and Amended OVEC-IKEC Agreement (in eTariff format);
- (c) A blacklined copy of the Amended ICPA, showing changes from the composite copy of the Current ICPA (including Mod. No. 1) (in eTariff format); and
- (d) A blacklined copy of the Amended OVEC-IKEC Agreement, showing changes from the Current OVEC-IKEC Agreement (in eTariff format).

⁴ OVEC filed Certificates of Concurrence from each of the Sponsoring Companies with respect to the Amended ICPA out of an abundance of caution since the Current ICPA contained certain ECAR emergency energy provisions permitting the Sponsoring Companies to sell emergency energy to OVEC. Since these ECAR requirements are no longer applicable, they have been removed in the Amended ICPA and thus the Amended ICPA as filed is not a "joint tariff filing" within the meaning of Order No. 714.

IV. Addresses for Correspondence

Correspondence relating to this filing should be addressed to:

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Respectfully submitted,

OHIO VALLEY ELECTRIC CORPORATION
INDIANA-KENTUCKY ELECTRIC
CORPORATION

By /s/ Brian E. Chisling
Brian E. Chisling
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Counsel for Ohio Valley Electric
Corporation and Indiana-Kentucky Electric
Corporation

AMENDED AND RESTATED
INTER-COMPANY POWER AGREEMENT

DATED AS OF SEPTEMBER 10, 2010

AMONG

OHIO VALLEY ELECTRIC CORPORATION,
ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.
APPALACHIAN POWER COMPANY,
BUCKEYE POWER GENERATING, LLC,
COLUMBUS SOUTHERN POWER COMPANY,
THE DAYTON POWER AND LIGHT COMPANY,
DUKE ENERGY OHIO, INC.,
FIRSTENERGY GENERATION CORP.,
INDIANA MICHIGAN POWER COMPANY,
KENTUCKY UTILITIES COMPANY,
LOUISVILLE GAS AND ELECTRIC COMPANY,
MONONGAHELA POWER COMPANY,
OHIO POWER COMPANY,
PENINSULA GENERATION COOPERATIVE, and
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

AMENDED AND RESTATED
INTER-COMPANY POWER AGREEMENT

THIS AGREEMENT, dated as of September 10, 2010 (the "Agreement"), by and among OHIO VALLEY ELECTRIC CORPORATION (herein called OVEC), ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C. (herein called Allegheny), APPALACHIAN POWER COMPANY (herein called Appalachian), BUCKEYE POWER GENERATING, LLC (herein called Buckeye), COLUMBUS SOUTHERN POWER COMPANY (herein called Columbus), THE DAYTON POWER AND LIGHT COMPANY (herein called Dayton), DUKE ENERGY OHIO, INC. (formerly known as The Cincinnati Gas & Electric Company and herein called Duke Ohio), FIRSTENERGY GENERATION CORP. (herein called FirstEnergy), INDIANA MICHIGAN POWER COMPANY (herein called Indiana), KENTUCKY UTILITIES COMPANY (herein called Kentucky), LOUISVILLE GAS AND ELECTRIC COMPANY (herein called Louisville), MONONGAHELA POWER COMPANY (herein called Monongahela), OHIO POWER COMPANY (herein called Ohio Power), PENINSULA GENERATION COOPERATIVE (herein called Peninsula), and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY (herein called Southern Indiana, and all of the foregoing, other than OVEC, being herein sometimes collectively referred to as the Sponsoring Companies and individually as a Sponsoring Company) hereby amends and restates in its entirety, the Inter-Company Power Agreement dated as of March 13, 2006, as amended by Modification No. 1, dated as of March 13, 2006 (herein called the Current Agreement), by and among OVEC and the Sponsoring Companies.

WITNESSETH THAT:

WHEREAS, the Current Agreement amended and restated the original Inter-Company Power Agreement, dated as of July 10, 1953, as amended by Modification No. 1, dated as of June 3, 1966; Modification No. 2, dated as of January 7, 1967; Modification No. 3, dated as of November 15, 1967; Modification No. 4, dated as of November 5, 1975; Modification No. 5, dated as of September 1, 1979; Modification No. 6, dated as of August 1, 1981; Modification No. 7, dated as of January 15, 1992; Modification No. 8, dated as of January 19, 1994; Modification No. 9, dated as of August 17, 1995; Modification No. 10, dated as of January 1, 1998; Modification No. 11, dated as of April 1, 1999; Modification No. 12, dated as of November 1, 1999; Modification No. 13, dated as of May 24, 2000; Modification No. 14, dated as of April 1, 2001; and Modification No. 15, dated as of April 30, 2004 (together, herein called the Original Agreement); and

WHEREAS, OVEC designed, purchased, and constructed, and continues to operate and maintain two steam-electric generating stations, one station (herein called Ohio Station) consisting of five turbo-generators and all other necessary equipment, at a location on the Ohio River near Cheshire, Ohio, and the other station (herein called Indiana Station) consisting of six turbogenerators and all other necessary equipment, at a location on the Ohio River near Madison,

1.012 "Arbitration Board" has the meaning set forth in Section 9.10.

1.013 "Available Energy" of the Project Generating Stations means the energy associated with Available Power.

1.014 "Available Power" of the Project Generating Stations at any particular time means the total net kilowatts at the 345-kV busses of the Project Generating Stations which Corporation in its sole discretion will determine that the Project Generating Stations will be capable of safely delivering under conditions then prevailing, including all conditions affecting capability.

1.015 "Corporation" means OVEC, IKEC, and all other subsidiary corporations of OVEC.

1.016 "Decommissioning and Demolition Obligation" has the meaning set forth in Section 5.03(f) hereof.

1.017 "Effective Date" means September 10, 2010, or to the extent necessary, such later date on which Corporation notifies the Sponsoring Companies that all conditions to effectiveness, including all required waiting periods and all required regulatory acceptances or approvals, of this Agreement have been satisfied in form and substance satisfactory to the Corporation.

1.018 "Election Period" has the meaning set forth in Section 9.183(a) hereof.

1.019 "Minimum Generating Unit Output" means 80 MW (net) for each of the Corporation's generation units; provided that such "Minimum Generating Unit Output" shall be confirmed from time to time by operating tests on the Corporation's generation units and shall be adjusted by the Operating Committee as appropriate following such tests.

1.0110 "Minimum Loading Event" means a period of time during which one or more of the Corporation's generation units are operating at below the Minimum Generating Output as a result of the Sponsoring Companies' failure to schedule and take delivery of sufficient Available Energy.

1.0111 "Minimum Loading Event Costs" means the sum of the following costs caused by one or more Minimum Loading Events: (i) the actual costs of any of the Corporation's generating units burning fuel oil; and (ii) the estimated actual additional costs to the Corporation resulting from Minimum Loading Events, including without limitation the incremental costs of additional emissions allowances, reflected in the schedule of charges prepared by the Operating Committee and in effect as of the commencement of any Minimum Loading Event, which schedule may be adjusted from time to time as necessary by the Operating Committee.

1.0112 "Month" means a calendar month.

1.0113 "Nominal Power Available" means an individual Sponsoring Company's Power Participation Ratio share of the Corporation's current estimate of the maximum amount of Available Power available for delivery at any given time.

1.0114 "Offer Notice" means the notice required to be given to the other Sponsoring Companies by a Transferring Sponsor offering to sell all or a portion of such Transferring Sponsor's rights, title and interests in, and obligations under this Agreement. At a minimum, the Offer Notice shall be in writing and shall contain (i) the rights, title and interests in, and obligations under this Agreement that the Transferring Sponsor proposes to Transfer; and (ii) the cash purchase price and any other material terms and conditions of such proposed transfer. An Offer Notice may not contain terms or conditions requiring the purchase of any non-OVEC interests.

1.0115 "Permitted Assignee" means a person that is (a) a Sponsoring Company or its Affiliate whose long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, has a Standard & Poor's credit rating of at least BBB- and a Moody's Investors Service, Inc. credit rating of at least Baa3 (provided that, if the proposed assignee's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such assignee's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); or (b) a Sponsoring Company or its Affiliate that does not meet the criteria in subsection (a) above, if the Sponsoring Company or its Affiliate that is assigning its rights, title and interests in, and obligations under, this Agreement agrees in writing (in form and substance satisfactory to Corporation) to remain obligated to satisfy all of the obligations related to the assigned rights, title and interests to the extent such obligations are not satisfied by the assignee of such rights, title and interests; provided that, in no event shall a person be deemed a "Permitted Assignee" if counsel for the Corporation reasonably determines that the assignment of the rights, title or interests in, or obligations under, this Agreement to such person could cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer.

1.0116 "Postretirement Benefit Obligation" has the meaning set forth in Section 5.03(e) hereof.

1.0117 "Power Participation Ratio" as applied to each of the Sponsoring Companies refers to the percentage set forth opposite its respective name in the tabulation below:

Company	Power Participation Ratio—Percent
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Allegheny	3.01
Appalachian.....	15.69
Buckeye.....	18.00
Columbus	4.44
Dayton.....	4.90
Duke Ohio.....	9.00
FirstEnergy.....	4.85
Indiana.....	7.85
Kentucky	2.50
Louisville	5.63
Monongahela.....	0.49
Ohio Power	15.49
Peninsula	6.65
Southern Indiana	<u>1.50</u>
Total	100.0

1.0118 "Tariff" means the open access transmission tariff of the Corporation, as amended from time to time, or any successor tariff, as accepted by the Federal Energy Regulatory Commission or any successor agency.

1.0119 "Third Party" means any person other than a Sponsoring Company or its Affiliate.

1.0120 "Total Minimum Generating Output" means the product of the Minimum Generating Unit Output times the number of the Corporation's generation units available for service at that time.

1.0121 "Transferring Sponsor" has the meaning set forth in Section 9.183(a) hereof.

1.0122 "Uniform System of Accounts" means the Uniform System of Accounts prescribed by the Federal Energy Regulatory Commission as in effect on January 1, 2004.

ARTICLE 2

TRANSMISSION AGREEMENT AND FACILITIES

2.01. *Transmission Agreement.* The Corporation shall enter into a transmission service agreement under the Tariff, and the Corporation shall reserve and schedule transmission service, ancillary services and other transmission-related services in accordance with the Tariff to provide for the delivery of Available Power and Available Energy to the applicable delivery point under this Agreement.

(b) The receipt of all regulatory approvals, in form and substance satisfactory to the Sponsoring Companies, necessary to permit the Sponsoring Companies to carry out all transactions contemplated herein.

9.15. *Notices.* All notices, requests or other communications under this Agreement shall be in writing and shall be sufficient in all respects: (i) if delivered in person or by courier, upon receipt by the intended recipient or an employee that routinely accepts packages or letters from couriers or other persons for delivery to personnel at the address identified above (as confirmed by, if delivered by courier, the records of such courier), (ii) if sent by facsimile transmission, when the sender receives confirmation from the sending facsimile machine that such facsimile transmission was transmitted to the facsimile number of the addressee, or (iii) if mailed, upon the date of delivery as shown by the return receipt therefor.

9.16. *Waiver.* Performance by any party to this Agreement of any responsibility or obligation to be performed by such party or compliance by such party with any condition contained in this Agreement may by a written instrument signed by all other parties to this Agreement be waived in any one or more instances, but the failure of any party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

9.17. *Titles of Articles and Sections.* The titles of the Articles and Sections in this Agreement have been inserted as a matter of convenience of reference and are not a part of this Agreement.

9.18. *Successors and Assigns.* This Agreement may be executed in any number of counterparts, all of which shall constitute but one and the same document.

9.181 This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, but a party to this Agreement may not assign this Agreement or any of its rights, title or interests in or obligations (including without limitation the assumption of debt obligations) under this Agreement, except to a successor to all or substantially all the properties and assets of such party or as provided in Section 9.182 or 9.183, without the written consent of all the other parties hereto.

9.182 Notwithstanding the provisions of Section 9.181, any Sponsoring Company shall be permitted to, upon thirty (30) days notice to the Corporation and each other Sponsoring Company, without any further action by the Corporation or the other Sponsoring Companies, assign all or part of its rights, title and interests in, and obligations under this Agreement to a Permitted Assignee, provided that, the assignee and assignor of the rights, title and interests in, and obligations under, this Agreement have executed an assignment agreement in form and substance acceptable to the Corporation

in its reasonable discretion (including, without limitation; the agreement by the Sponsoring Company assigning such rights, title and interests in, and obligations under, this Agreement to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment).

9.183 Notwithstanding the provisions of Section 9.181, any Sponsoring Company shall be permitted to, subject to compliance with all of the requirements of this Section 9.183, assign all or part of its rights, title and interests in, and obligations under this Agreement to a Third Party without any further action by the Corporation or the other Sponsoring Companies.

(a) A Sponsoring Company (the "Transferring Sponsor") that desires to assign all or part of its rights, title and interests in, and obligations under this Agreement to a Third Party shall deliver an Offer Notice to the Corporation and each other Sponsoring Company. The Offer Notice shall be deemed to be an irrevocable offer of the subject rights, title and interests in, and obligations under this Agreement to each of the other Sponsoring Companies that is not an Affiliate of the Transferring Sponsor, which offer must be held open for no less than thirty (30) days from the date of the Offer Notice (the "Election Period").

(b) The Sponsoring Companies (other than the Transferring Sponsor and its Affiliates) shall first have the right, but not the obligation, to purchase all of the rights, title and interests in, and obligations under this Agreement described in the Offer Notice at the price and on the terms specified therein by delivering written notice of such election to the Transferring Sponsor and the Corporation within the Election Period; provided that, irrespective of the terms and conditions of the Offer Notice, a Sponsoring Company may condition its election to purchase the interest described in the Offer Notice on the receipt of approval or consent from such Sponsoring Company's Board of Directors; provided further that, written notice of such conditional election must be delivered to the Transferring Sponsor and the Corporation within the Election Period and such conditional election shall be deemed withdrawn (as if it had never been provided) unless the Sponsoring Company that delivered such conditional election subsequently delivers written notice to the Transferring Sponsor and the Corporation on or before the tenth (10th) day after the expiration of the Election Period that all necessary approval or consent of such Sponsoring Company's Board of Directors have been obtained. To the extent that more than one Sponsoring Company exercises its right to purchase all of the rights, title and interests in, and

obligations under this Agreement described in the Offer Notice in accordance with the previous sentence, such rights, title and interests in, and obligations under this Agreement shall be allotted (successively if necessary) among the Sponsoring Companies exercising such right in proportion to their respective Power Participation Ratios.

(c) Each Sponsoring Company exercising its right to purchase any rights, title and interests in, and obligations under this Agreement pursuant to this Section 9.183 may choose to have an Affiliate purchase such rights, title and interests in, and obligations under this Agreement; provided that, notwithstanding anything in this Section 9.183 to the contrary, any assignment to a Sponsoring Company or its Affiliate hereunder must comply with the requirements of Section 9.182.

(d) If one or more Sponsoring Companies have elected to purchase all of the rights, title and interests in, and obligations under this Agreement of the Transferring Sponsor pursuant to the Offer Notice, the assignment of such rights, title and interests in, and obligations under this Agreement shall be consummated as soon as practical after the delivery of the election notices, but in any event no later than fifteen (15) days after the filing and receipt, as applicable, of all necessary governmental filings, consents or other approvals and the expiration of all applicable waiting periods. At the closing of the purchase of such rights, title and interests in, and obligations under this Agreement from the Transferring Sponsor, the Transferring Sponsor shall provide representations and warranties customary for transactions of this type, including those as to its title to such securities and that there are no liens or other encumbrances on such securities (other than pursuant to this Agreement) and shall sign such documents as may reasonably be requested by the Corporation and the other Sponsoring Companies. The Sponsoring Companies or their Affiliates shall only be required to pay cash for the rights, title and interests in, and obligations under this Agreement being assigned by the Transferring Sponsor.

(e) To the extent that the Sponsoring Companies have not elected to purchase all of the rights, title and interests in, and obligations under this Agreement described in the Offer Notice, the Transferring Sponsor may, within one-hundred and eighty (180) days after the later of the expiration of the Election Period or the deemed withdrawal of a conditional election by a Sponsoring Company under Section 9.183(b) hereof (if applicable), enter into a definitive agreement to, assign such rights, title and interests in, and obligations under this Agreement to a Third Party at a price no less than 92.5% of the purchase price specified in the Offer Notice and on other material terms and conditions no more

favorable to the such Third Party than those specified in the Offer Notice; provided that such purchases shall be conditioned upon: (i) such Third Party having long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, with a Standard & Poor's credit rating of at least BBB- and a Moody's Investors Service, Inc. credit rating of at least Baa3 (provided that, if such Third Party's long-term unsecured non-credit enhanced indebtedness is not currently rated by one of Standard & Poor's or Moody, such Third Party's long-term unsecured non-credit enhanced indebtedness, as of the date of such assignment, must have either a Standard & Poor's credit rating of at least BBB- or a Moody's Investors Service, Inc. credit rating of at least Baa3); (ii) the filing or receipt, as applicable, of any necessary governmental filings, consents or other approvals; (iii) the determination by counsel for the Corporation that the assignment of the rights, title or interests in, or obligations under, this Agreement to such Third Party would not cause a termination, default, loss or payment obligation under any security issued, or agreement entered into, by the Corporation prior to such transfer; and (iv) such Third Party executing a counterpart of this Agreement, and both such Third Party and the Sponsoring Company which is assigning its rights, title and interests in, and obligations under, this Agreement executing such other documents as may be reasonably requested by the Corporation (including, without limitation, an assignment agreement in form and substance acceptable to the Corporation in its reasonable discretion and containing the agreement by such Sponsoring Company to reimburse the Corporation and the other Sponsoring Companies for any fees or expenses required under any security issued, or agreement entered into, by the Corporation as a result of such assignment, including without limitation any consent fee or additional financing costs to the Corporation under the Corporation's then-existing securities or agreements resulting from such assignment). In the event that the Sponsoring Company and a Third Party have not entered into a definitive agreement to assign the interests specified in the Offer Notice to such Third Party within the later of one-hundred and eighty (180) days after the expiration of the Election Period or the deemed withdrawal of a conditional election by a Sponsoring Company under Section 9.183(b) hereof (if applicable) for any reason or if either the price to be paid by such Third Party would be less than 92.5% of the purchase price specified in the Offer Notice or the other material terms of such assignment would be more favorable to such Third Party than the terms specified in the Offer Notice, then the restrictions provided for herein shall again be effective, and no assignment of any rights, title and interests in, and obligations under this Agreement may be made thereafter without again offering the same to Sponsoring Companies in accordance with this Section 9.183.

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Summary: Comments of Industrial Energy Users-Ohio electronically filed by Mr. Frank P Darr
on behalf of Industrial Energy Users-Ohio